United States Court of Appeals for the Second Circuit



APPENDIX

75-7663

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 75-7663

AJAX HARDWARE MANUFACTURING CORPORATION

Plaintiff-Appellant,

-V.-

INDUSTRIAL PLANTS CORPORATION

Defendant-Appellee.

On Appeal From The United States District Court For The Southern District Of New York

JOINT APPENDIX

VOLUME VI (Pages A-1638 through A-1952)

PORTIONS OF RECORD ON APPEAL



POLETTI FREIDIN
PRASHKER FELDMAN & GARTNER
Attorneys for Plaintiff-Appellant
777 Third Avenue
New York, New York 10017

MONASCH CHAZEN & STREAM
Attorneys for Defendant-Appellee
733 Third Avenue
New York, New York 10017

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

VOLUME I

Designated Port	tions of Record on Appeal	Appendix Page
A-E	Docket Entries	A-1
R-1	Complaint, filed May 5, 1969	A-6
R-7	Defendant's Answer dated June 5, 1969	A-14
R-23	Pre-trial order dated January 11, 1974	A-16
R-24 (in part)	Plaintiff's Requests to Charge, dated February 19, 1974 - Nos. 11, 12, 15, 17, 18, 19	A-30
R-25 (in part)	Plaintiff's Supplemental Requests to Charge - Nos. 24, 25, 27, 29, 30	A-39
R-28	Defendant's Affidavit for Adjournment of trial, dated March 6, 1975	A-50
R-29	Plaintiff's Affidavit in Support of Motion for Adjournment, dated April 18, 1975 (endorsed with Order of Judge Levet, April 22, 1975)	A-52
R-31	Defendant's Motion for Judgment n.o.v. or a New Trial with Affidavit of Arnold Stream, dated May 8, 1975	A-75
R-33	Plaintiff's Motion for Judgment n.o.v. or a New Trial on Damages with Affidavit of Murray Gartner dated May 12, 1975	A-93
R-37	Memorandum and Order on Post-Trial Motions dated May 28, 1975	A-108
R-38	Notice of Motion to Amend Order, dated June 5, 1975	A-115
R-39 (in part)	Affidavit in Opposition to Motion to Amend Order, dated June 10, 1975 (pp 1-8)	A-121

		Appendix Page
R-41	Memorandum and Order Denying Plain- tiff's Motion to Amend Order Pur- suant to 28 USC §1292(b), dated June 11, 1975	A-129
R-42	Plaintiff's Motion Under 28 U.S.C. §455 with Affidavit of Murray Gartner, dated June 10, 1975. (endorsed with Order of Judge Levet on June 24, 1975)	A-132
R-44	Letter from Hon. Richard Levet to counsel, enclosing proposed form of Special Verdict, dated July 10, 1975 (with special verdict form)	A-140
R-45	Form of Special Verdict Proposed by Defendant, dated July 23, 1975	A-143
R-46	Plaintiff's Proposed Special Verdict and Objections to Special Verdict, dated September 2, 1975	A-146
R-48	Defendant's Request for Production of Documents Pursuant to Rule 34 F.R.C.P., dated September 10, 1975	A-161
R-49	Response to Defendant's Request for Production of Documents Dated September 10, 1975; dated September 22, 1975	A-165
R-50	Motion for Protective Order and Other Relief and Affidavit, dated September 23, 1975	A-171
R-51	Notice of Intention to Amend Defendant' Answer, datad September 22, 1975	s A-227
R-54	Requests for Admissions of Defendant, dated September 25, 1975	A-229
R-56	Stipulation, dated September 30, 1975	A-233
R-59	Notice of Intention to Seek the Amendment of the Pre-Trial Order, dated October 2, 1975	A-235

		Appendix Page
R-60	Second Notice of Intention to Amend Defendant's Answer Dated October 2, 1975	A-237
R-61	Affidavit in Opposition to Defendant's Notice of Intention to Amend Answer and Pre-Trial Order, dated October 8, 1975	A-239
R-62	Plaintiff's Requests to Charge dated October 9, 1975	A-245
R-71	Plaintiff's Additional Special Verdict Question	A-247
R-72	Plaintiff's Additional Request to Charg	e A-248
R-73	Final Judgment dated October 24, 1975 and entered October 28, 1975 (Special Verdict annexed)	A-249
R-7	Notice of Appeal	A-253
R-89	Plaintiff's Motion to Correct Record on Appeal, dated March 11, 1976	A-255
R-90	Defendant's Objection to Plaintiff's Proposed Further Statement of Proceedings, dated March 17, 1976	Λ-322
R-91	Affidavit of Arnold Stream, Esq. in Opposition to Plaintiff's Motion, dated March 17, 1976	A-324
R-92	Reply Affidavit of Edward Brill in Support of Motion to Correct Record on Appeal, dated March 24, 1976	A-331
R-93	Memorandum and Order on Motion to Correct Record on Appeal (Levet, J.),	A-337

Designated Portions of Transcript of Proceedings

VOLUME II

	Appendix Page
April 17, 1975	A-344
April 18, 1975	A-367
April 23, 1975	A-370
April 24, 1975	A-485
April 25, 1975	A-600
V	OLUME III
April 28, 1975	A-681
April 29, 1975	A-784
April 30, 1975	A-902
May 1, 1975	A-988
VC	DLUME IV
June 9, 1975	A-1007
September 12, 1975	A-1026
October 2, 1975	A-1033
October 14, 1975	A-1044
October 15, 1975	A-1135
Ā	OLUME V
October 16, 1975	A-1307
October 17, 1975	A-1474

VOLUME VI

	Appendix Page
October 20, 1975	A-1638
October 21, 1975	A-1752
October 22, 1975	A-1848
October 23, 1975	A-1949

1

3

4

5

6

8

9

10

11

12

13

14

15

16

with?

17

18

19

20

21

23

24

25

of all parts being manufactured and all assemblies before they were shipped out to be sold.

THE COURT: What parts were being manufactured generally speaking?

THE WITNESS: We manufactured in our factory all of the parts that went into Hamilton watches at that time, sir. Actually beginning with the alloying of special steels for our own springs, we made all our own screws, wheels, pinions, everything.

Q Did your duties up until this point, Mr. Sinkler, involve any knowledge of machinery?

A Yes, it had to --

THE COURT: What machinery were you concerned

MR. BRILL: Watchmaking machinery.

THE COURT: I am asking him, counselor, not you. Let him testify.

A The watchmaking machinery we used to manufacture all parts in the factory were subject to the approval of the quality division before those parts were shipped into the assembly departments.

THE COURT: All right. How long were you there?

THE WITNESS: I remained there until 1951. While I

watchmaking machinery and the available sources and types of

25

What did you do, Mr. Sinkler?

25

1

3

4

5

6

7

8

9

10

11

12

13

14

16

17

-

18

19

21

22

23

24

25

A I was the American watch manufacturing industries spokesman before the Tariff Commission beginning in 1952 and continuing periodically until 1965.

Q In connection with that position as spokesman, did you do anythin; to acquire information concerning the economic conditions of the industry?

THE COURT: What industry and what country, please.

Q The watch manufacturing industry in the United States.

A Yes, sir, I had to.

THE COURT: Yes, sir, is the answer.

Q What did you do, Mr. Sinkler?

A I received from all of the manufacturers, four of them in the United States, their manufacturing production figures and their economic situation to present that to the Tariff Commission.

Did you review any other sources of information concerning the economics of the watch manufacturing industry in the United States?

A Yes, sir, I did.

Q What other sources?

A All possible trade publications, magazines, government publications, both foreign and domestic on the manufacture of watches.

1	jq/lf Sinkler-Direct 645
2	Q Are you familiar with the American Watch Manufacturers
3	Association, Mr. Sinkler?
4	A Yes, I am.
5	Q What is that organization?
6	A That was an organization that was composed of the
7	jeweled lever watch manufacturers in the United States which
8	included Bulova, Hamilton, Waltham and Elgin.
9	Q Was a company known as Precision Time or Time &
10	Micro a member of that organization?
11	A No, sir.
12	Q Do you know whether Precision Time or Time & Micro
13	at any time made jeweled lever watches as opposed to pin lever
14	watches, the other type you told us about?
15	A They manufactured jeweled lever watches.
16	THE COURT: What are those kinds?
17	THE WITNESS: Jeweled lever watches are jeweled
18	watches similar to the type that Hamilton made. They are
19	more expensive and more accurate.
20	THE COURT: You say Micro manufactured that kind?
21	THE WITNESS: Yes, they did.
22	Q About what share of the United States products did
23	Time & Micro have in the 1960's, if you know?
24	MR. STREAM: Objection, irrelevant and immaterial.
25	THE COURT: Sustained.

	II .		1
1	Jq/16	Sinkler-Direct 646	
2	Q	How many watch manufacturers were there in the United	
3	States i	n 1966?	
4	A	In 1966 jeweled lever watches?	
5	Q	Yes.	
6		THE COURT: If you know.	
7	A	Bulova, Hamilton	
8		THE COURT: He asked you how many, sir.	
9	A	Four.	
10	٥.	Can you name them?	
11	A	Bulova, Hamilton, Elgin, Hamilton.	
12	Q	I think you repeated Hamilton twice.	
13	A	Bulova, Elgin there were only three.	
14	Waltham h	ad gone out of business.	
15		THE COURT: What are the three?	
16	A	Bulova, Hamilton, Elgin.	
17	Q	What period of time are you talking about?	
18	A	You said 1966.	
19	Q	What about Time & Micro in that period or Precision	
20	Time?		
21	A	I should have included them. I assume they were	
22	still ope	rating.	
23	Q	Do you know if they were still operating at that	
24	point?		
25	А	I don't know, sir.	

1	jq/lf . Sinkler-Direct 647
2	Q Were there other watch manufacturers in the United
3	States, Mr. Sinkler, prior to 1966, back into the 1960's
4	and 1950's?
5	A Yes, there were others.
6	Q What others were there?
7	MR. STREAM: Objection.
8	THE COURT: Sustained.
9	Q How many others were there?
10	MR. STREAM: Objection, irrelevant and immaterial.
11	THE COURT: I don't know how that is relevant.
12	MR. BRILL: We are attempting to show a trend of the
13	decline of watch industry which culminated in 1966.
14	THE COURT: I will allow it. We get too many side-
15	tracks.
16	Q You may answer the last question.
17	THE COURT: What is the last question?
18	Q How many other watch manufacturers were there in
19	the United States?
20	THE COURT: When?
21	MR. BRILL: During the 1950's and '60's.
22	
23	THE COURT: That is covering quite a period.
24	It might vary considerably. You better fix a date. Q Between 1955 and 1965.
25	2,00,0
	THE COURT: That is ten years. Can you answer that?
	· A-1645

3

4

5

7

8

9

10

11

12

14

16

17

18

19

21

22

24

25

THE COURT: I am not going to take any offer of proof. It's clear and not difficult to pass on that question.

Q Do you know based on your experience as president of the Hamilton Watch Company what the prognosis was in August, 1966, for the American Watch Manufacturers Industry as to its continued ability to manufacture watches?

MR. STREAM: I object to that.

THE COURT: Yes, that is speculative.

MR. BRILL: I request at this time --

THE COURT: I said it was speculative I sustain the objection.

MR. BRILL: I request that the Court declare this witness as an expert.

THE COURT: He may be an expert but that doesn't mean to can testify on all sorts of phases of it, counselor.

MR. BRILL: An expert particularly --

THE COURT: Don't argue that with me. I am not going to listen. I won't listen to that. I have ruled.

If you want to ask some other question of this, do so. Let's get through.

MR. BRILL: It is critical to this case --

THE COURT: I don't care how critical it may be.

I have to pass on the objections.

MR. BRILL: I am offering this witness as an expert

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

jq/lf Sinkler-Direct THE COURT: What do you want to offer? 2 MR. STREAM: Not before the jury. 3 THE COURT: I will excuse the jury. I don't think 4 it's relevant. You have examined him about the tariff. He 5 6 testified in effect that the tariff of 2.50 on the large 7 watches and 3.75 on the ladies' watches protected the American industry. There has been no proof of change in the tariff. 9 MR. BRILL: That is what I am attempting to get at. 10 THE COURT: Well, ask it for heaven's sake. Don't 11 go all around the bush about it. 12 MR. BRILL: The question was what was the 13 situation in 1966, your Honor. 14 THE COURT: The situation, that is vague. That is 15 a matter of form and you cannot institute questions like 16 that. Get down to earth on this one, if you can. 17 MR. BRILL: I am attempting to, your Honor. 18 THE COURT: Do so. 19 State your question, if you can. 20 Mr. Sinkler, did the rates on imported watches, Q 21 the duty rates go down subsequent to 1966? 22 Yes.

654

THE COURT: When?

23

24

25

THE WITNESS: January, 1967.

When was that change initiated, Mr. Sinkler? Q

jq/lf

Sinkler-Direct

MR. STREAM: Objection.

MR. BRILL: That is the most crucial fact in this case.

MR. STREAM: I don't care about that. An act is an act when it becomes an act, your Honor.

THE COURT: Sustained. That is a vague question. Go on now, please.

Q Mr. Sinkler, I would like to ask you a hypothetical question. If you as president of Hamilton Watch Company or as spokesman for the American Watch Manufacturers Association had been asked by a professional appraiser or anyone else in August of 1966 as to the likelihood, as to the continued ability of the watch manufacturing industry in this country to continue to manufacture watches, what would your answer have been?

A The answer would have been that it would be impossible to continue manufacturing in the United States after that date.

- Q What is the reason that you give for that opinion?
- A Because the rates of duty were in the process of being reduced and it became effective January, 1967. They were cut in half.
- Q How would someone outside the watch industry have found out that the rates of duty were in the process of being A-1351

1	jq/lf Sinkler-Direct 656
2	reduced?
3	MR. STREAM: Objection. It calls for a state of
4	mind and a conclusion.
5	MR. BRILL: It's a simple fact.
6	THE COURT: Overruled. I will let him answer. How
7	would somebody find out about it?
8	THE WITNESS: It's common knowledge within the watch
9	industry, the jewelry industry and it was reported frequently
10	in the public press.
11	MR. STREAM: I move to strike out that answer.
12	THE COURT: Strike the answer out. The press is
13	merely hearsay.
14	Q How would someone have found out about it, Mr.
15	Sinkler?
16	THE COURT: If you can tell outside of reading
17	newspapers.
18	A The reports of the U.S. Tariff Commission were
19	publicly available in 1965.
20	Q What if someone had called up any of the United
21	States watch manufacturers, Mr. Sinkler?
22	THE COURT: I don't know what that means.
23	Q What information could someone have obtained concern-
24	ing the tariffs in 1966 by calling a United States watch

manufacturer?

1	jq/lf Sinkler-Direct 657
2	MR. STREAM: Objection.
3	THE COURT: Objection sustained. It's purely speculative
4	and hearsay.
5	MR. STREAM: My objection to it is registered,
6	your Honor.
7	Q Do you know if any of the United States watch
8	manufacturers had made concrete plans during the year 1966
9	based on the projected change in the tariff laws?
10	MR. STREAM: That is not expert testimony, that is
11	factual testimony and it calls for hearsay.
12	THE COURT: Sustained.
13	Q Do you know whether Hamilton, one of the three
14	watch companies in the United States had made such plans,
15	Mr. Sinkler?
16	A Yes, sir.
17	© What plans had Hamilton made during 1966?
18	A We had planned for and had filed the plans with
19.	the Tariff Commissions as to exactly how we would phase out
20	watch manufacturing in the United States, jeweled lever
21	watch manufacturing in the United States.
22	THE COURT: How Hamilton would phase it out?
23	THE WITNESS: Yes, sir.
24	Q When were those plans filed?
25	A In 1964.

1	jq/lf Sinkler-Direct 658
2	THE COURT: When were they formed?
3	THE WITNESS: Filed.
4	THE COURT: What difference does it make?
5	Q I believe you testified that the tariffs were in
6	fact reduced in January
7	THE COURT: Yes, that is repetitious, counselor.
8	Q What happened to Hamilton and other manufacturers
9	after the tariff change?
10	MR. STREAM: I object to the form of the question.
11	THE COURT: Sustained as to form.
12	MR. STREAM: I don't mind if he asks as to Hamilton
13	MR.BRILL: He also had responsibility for the
14	others
15	THE COURT: I sustain the objection. Reframe your
16	question if you want to press that.
17	Q What, if anything, happened at Hamilton after the
18	tariff change, Mr. Sinkler?
19	A We instituted our plans and made the last jeweled
20	lever watch in the United States in November of that year.
21	THE COURT: What year again?
22	THE WITNESS: 1967.
23	Q Are there any other watch manufacturers remaining
	in the United States, Mr. Sinkler?
25	MR. STREAM: Objection, hearsay.

THE COURT: I sustained the objection. I won't permit any further comments and I instruct the jury to disregard comments.

MR. BRILL: I am asking this witness be qualified as an expert.

THE COURT: He isn't an expert on everything.

MR. BRILL: Not solely on watch manufacturing but on the supply and demand for watches in this country and the supply and demand for watch manufacturing machinery.

THE COURT: You didn't ask him anything at all about that. That was not your question.

Q Were you familiar with the supply and demand for watches and watch manufacturing machinery in this country in August --

THE COURT: That is two questions.

Q Watch manufacturing machinery -THE COURT: Which is it going to be?

Q Were you familiar, Mr. Sinkler, with the supply and demand for watch manufacturing machinery in this country in August of 1966?

A Yes, sir.

Q Based on that familiarity, Mr. Sinkler, in your opinion, would there have been anyone to whom a collection of highly specialized watch manufacturing machinery could

19

20

21

22

23

24

25

Because a company such as Hamilton and others in the same position were not expanding, they were planning to go out of the business and there would be no sale for that highly specialized equipment.

9 What is the reason for that?

MR. STREAM: The reason for his opinion I accept but the secondary reason I object to.

THE COURT: Rephrase the question.

You say Hamilton and other manufacturers were planning to go out of business, Mr. Sinkler. Would you explain what you mean by they were planning to go out of business?

THE COURT: That is clear enough.

- Why were they planning to go out of business? Q THE COURT: In his opinion.
- In your opinion, why were they planning to go out of business?

A Because it was no longer profitable to manufacture watches in the United States.

Q In your opinion why was it no longer profitable to manufacture watches in the United States in 1966?

Because it was scheduled to have a reduction in duty and that would make it impossible to make a profit.

THE COURT: Why?

A-1658

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE. NEW YORK, N.Y. - 791-1020

1	jq/lf Sinkler-Direct 664
2	THE WITNESS: Because our costs were too high in
3	the U.S. market to compete with the Swiss costs.
4	THE COURT: Please go on. Finish up with this
5	witness. You have had him for over an hour, I believe.
6	MR. BRILL: I don't think so, your Honor, about 40
7	minutes so far.
8	THE COURT: It's been long enough, I think, for
9	the material you wish to cover.
10	O Mr. Sinkler, can the machines and manufacturing
11	methods used to manufacture watches be used to produce any-
12	thing other than watches?
13	MR. STREAM: I object to the question. It's too
14	broad and unclear.
15	THE COURT: Yes.
16	Q Directing your attention to Plaintiff's Exhibit 6,
17	which is a list of the machinery contained in the precision
18	THE COURT: Let him look at it. It speaks for
19	itself.
20	What is the question?
21	Q Incidentally, Mr. Sinkler, where is Ham ton located?
22	A Lancaster, Pennsylvania.
23	Q Were you familiar with the Precision Time or Time
24	& Micro plant?
25	THE COURT: Wait a minute, I don't know whether they

20

16

17

18

19

22

THE COURT: That he is not qualified to answer that

23

question. I don't have to go into executive session or anything

24

25

to decide that.

Mr. Sinkler, during your period of employment by

SOUTHERN DISTRICT COURT REPOL RS. U.S. COURTHOUSE

allowed to ask of this witness.

your Honor would not rush me.

3

7

8

10 11

12

13

14

15

16

17

18

19

20 21

22

25

THE COURT: You can stop at any time you want with him. That doesn't mean I am going to listen later to these offers of proof. I will decide that later if there is any further statement about 1t.

Will you please go on ard conclude with this witness. , MR. BRILL: I am attempting to proceed. I wish

THE COURT: I am not rushing you at all. I am simply trying to declare what is and what is not proper testimony.

Q Do you know whether watch manufacturing machinery can be used to manufacture timing mechanisms for fuses?

A Yes, sir.

Do you know whether any modifications are needed in this watch manufacturing machinery before it can be used to manufacture fuses?

Only retooling them for fuses.

What do you mean by retooling?

Changing drills, cutters, cams on the basic machine to make a different kind of part.

Q Do you know if the Time & Micro Company or Precision Time Company ever supplied timing mechanisms or fuses for the United States government?

1	jq/lf Sinkler-Direct 672	
2	side of the scope of his expertise.	
3	THE COURT: Sustained.	
4	MR. STREAM: It calls for an engineering judgment	
5	which he hasn't been shown he has the capability of making.	
6	THE COURT: Sustained.	
7	Q Mr. Sinkler, approximately how many companies in	
8	the United States in 1966 were actually manufacturing timing	
9	mechanisms for fuses?	
10	MR. STREAM: Objection, completely outside the	
11	scope of this man's expertise.	
12	THE COURT: Sustained.	
13	MR. BRILL: Mr. Sinkler testified that he was on	
14	the fuse committee	
'15	MR. STREAM: I wish counsel would not make these	
16	statements before the jury.	
17	THE COURT: Disregard all statements of counsel.	
18	I have to listen to objections but I don't have to listen	
19	to repeated statements of a comment character.	
20	MR. BRILL: I wish we had the opportunity to argue	
21	these points outside the presence of the jury but unfortunatel	y
22	THE COURT: You must proceed now. I have ruled.	
23	Q I ask you a hypothetical question as follows: assume	
24	that a company obtains its first government contract to	
25	manufacture fuses. Assume that this consider is for the manu-	
	A-1664	

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

1	jq/lf	Sinkler-Direct 674
2	C	Are you familiar with the so-called Swiss watch trust
3	A	Yes, sir.
4	Q	What is that Swiss watch trust, Mr. Sinkler, or
5	what was	it during the period 1964 through 1966?
6		MR. STREAM: Objection, irrelevant and immaterial.
7		MR. BRILL: It's relevant to state it's made
8		THE COURT: Disregard counsel's statement. Won't
9	you pleas	e heed what I have said to you hundreds of times,
10	certainly	
11		There is no foundation of any knowledge.
12		MR. BRILL: I asked in the previous question whether
13	he was fa	miliar with the Swiss watch trust.
14		THE COURT: That doesn't make him familiar.
15	Q	Were you familiar with the Swiss watch trust ir.
16	Sinkler?	
17	A.	Yes, sir.
18	Q	How did you obtain that familiarity?
19	А	I first visited the headquarters of the Swiss cartel.
20		THE COURT: Where was that?
21		THE WITNESS: In Bienne, Switzerland, in 1952. I
22	met with n	members of the cartel on many occasions at least
23		ar from then on.
24	Q	I direct your attention to the following statement
25	contained	in Plaintiff's Exhibit 5
		A-1666
11		

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

	1 Jq/lr Sinkler-Direct 675
	THE COURT: Wait a minute. What is he going to do,
;	take this paper?
4	MR. BRILL: I am going to read him a statement
5	
6	THE COURT: And ask him a question about it?
7	
8	THE COURT: I don't think that is proper.
9	MR. BRILL: I will show it to him.
10	THE COURT: What exhibit is this?
11	MR. BRILL: Plaintiff's Exhibit 5.
12	Q Would you read that to yourself and read to the
13	jury the sentence beginning, "The machinery contained"
14	A Aloud?
15	Q Yes.
16	THE COURT: No, to yourself.
17	MR. STREAM: Read it to yourself and counsel can
18	ask a question as to a fact.
19	A Yes, sir.
20	
21	THE COURT: You have read it to yourself?
22	THE WITNESS: Yes, sir.
23	THE COURT: What is your question, counselor?
24	MR. BRILL: I would like to
25	THE COURT: Ask a question, not what you would like
	to do. A-1667

•

MR. BRILL: Before I can ask him a question based on that sentence the jury is entitled to know what it is he read.

MR. STREAM: That is not so. This witness is entitled to answer a question that the witness can answer. He isn't there to damage, impede or impune documents. He is entitled to answer as to facts.

MR. BRILL: I am asking what his opinion is concerning -- I will ask the question rather than argue with counsel.

THE COURT: That is a good move.

Q Mr. Sinkler, in your opinion, would you tell us whether the statement which you have just read, that is that the machinery --

MR. STREAM: I respectfully object to his attempting to do by question what your Honor has ruled he may not do through this witness which is to say to read him a statement. I surgest that counsel ask a question along the following line, because I know what he is trying to do and I don't mind that.

MR. BRILL: I appreciate if I do ry examination.

MR. STREAM: Then I object to the question.

THE COURT: You might listen to your adversary once in awhile. You might get some progress on this impasse --

MR. BRILL: I want to ask him whether a statement

XXX

24

25

MR. STREAM: I object to the form because it's not

clear whether it's American or Swiss.

THE COURT: Sustained, counsel. Get down to earth.

7

10

11

12

13

14

15

16

17

18

19

20

21

22

23

25

THE WITNESS: Yes, sir.

THE COURT: I thought the question was something about American machines.

(Question read)

MR. STREAM: I don't object to the answer, your Honor

679

A-1671

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

this country would have paid premiums above those values if

1	jq/lf	Sinkler-Direct	681
2	that mach	ninery had been made available to them in 1966.	
3	A	There was no market	
4		THE COURT: Answer the question yes or no.	
5	A	No.	
6	Q	What is the basis for your opinion, Mr. Sinkle	er?
7	A	There was no market for them, nobody wanted to	buy
8	any.		
9	Q	Why was there no market for this machinery in	
10	August of	1966?	
11	A	Because the U.S. companies were planning to g	o out
12	of the bus	siness and weren't looking for new machines.	
13	6	Also directing your attention to Plaintiff's	
14	Exhibit 6,	, Mr. Sinkler, and the listed machinery contain	ed
15	therein, o	can you tell us whether there were other watch	
16	manufactur	ring facilities in this country with the same e	quip-
17	ment, the	same high precision equipment as that contained	d
18	in the Tim	me & Micro plant?	
19	A	Yes.	
20	Q	In 1966.	
21	A	Yes.	
22	Q	What companies were those?	
23	A	Hamilton Watch Company for one.	
24	Q .	Any others?	
25	Α 1	Bulova, Elgin.	

1	Jq/lf Sinkler-Direct 682
2	Q How much of this equipment did Hamilton, Bulova
3	and Elgin contain as compared to the amount Time & Micro
4	contained?
5	MR. STREAM: Objection, irrelevant and immaterial.
6	THE COURT: Sustained.
7	MR. BRILL: I have no further questions except to
8	make the offer of proof which I requested previously.
9	THE COURT: You may cross examine, Mr. Stream.
10	CROSS EXAMINATION
11	BY MR. STREAM:
12	Q Good morning, Mr. Sinkler. We met once before,
13	didn't we?
14	A Yes, sir.
15	Q You have never had any experience, have you, in
16	appraising machinery?
17	A Making appraisals, no, sir.
18	Q When you mentioned in your direct testimony the
19	U.S. Tariff Commission and said you were a spokesman, you
20	didn't mean to imply that you were a member of the U.S.
21	Tariff Commission, were you?
22	A No, sir.
23	Q You were simply an industry representative to
24	tostify before the commission, right?
25.	

at is correct.

1	Jq/lf Sinkler-Cross 683 .
2	Along with many others who gave their expert help
3	to the U.S. Commission, right?
4	A That is correct.
5	Q And you did tell us, didn't you, that in 1966 from
6	the beginning of the year until the end or at least until
7	the middle of the year there were only four companies in
8	the entire United States which manufactured jeweled lever
9	watches, isn't that right?
10	A That is correct.
11	C That was Hamilton and Elgin?
12	A Right.
13	Q And Bulova?
14	A Right.
15	Q And this Time & Micro Company down in Strasburg,
16	Pennsylvania, right?
17	A Yes, sir.
18	Q It is one of the four leading manufacturers, if not
19	the exclusive manufacturer, of these jeweled lever watches,
20	right?
21	MR. BRILL: Objection to the form, characterization.
22	(Question read)
23	THE COURT: Overruled.
24	Q Time & Micro, which you know, don't you, used to be
25	called Precision Time Instruments?
	A-1675
1	

1	jq/lf Sink	ler-Cross		684
2	A That is correct			
3	Q That was the na	ime you knew	it by?	
4	A That is right.			
5	Q That company al	ong with Ha	milton, Elgin a	nd Bulova,
6	were the four leading man	ufacturers	and probably the	only
7	four manufacturers at the	t time, whi	ch is 1966, of je	eweled
8	lever watches?			
9	A They were the o	nly four.		
10	O And jeweled lev	er watches	represent the hi	lghest
11	quality type watch, isn't	that so?		
12	A That is correct			
13	Q You told us tha	t you were	familiar with th	e plant
14	of Time & Micro, didn't y	ou?		
15	A At its very ear	ly days, yes	3.	•
16	THE COURT: When	?		
17	THE WITNESS: 1	960, I think	٠.	
18	Q You said 1960,	you think 19	960	
19	A Shortly after t	hey opened.	I don't rememb	er when
20	it was. It was about the	n.		
21	Q Don't you remem	ber testify:	ing previously t	hat you
22	saw it at one time only i	n 1959?		
23	A It could have b	een.		
24	Q By the way, did	you read yo	our previous tes	timony
25	before coming to court to	day?	•	
		A-1676		
		CT COURT REPORTER		

FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

1	Jq/lf	Sinkler-Cross	685
2	А	Yes, sir.	
3	Q	And that trip in 1959, by the way, is that	the date
4	now you	say is more accurate than 1960?	
5	A	I would assume so.	
6	Q	I beg your pardon?	
7	A	I would assume so. I am not sure what dat	e it
8 .	was. It	was just after they opened.	
9	Q	If I were to remind you that you stated un	condition-
10	ally that	t it was 1959 in your previous testimony wou	ld you
11	accept th	nat testimony?	
12	A	I think I said that I estimated it was '59.	
13	Q .	May I call your attention to your answer or	n page
14	37 of the	transcript to the following question:	
15		"Q Are you familiar with that plant?	?
16		"A Fairly so, in its early days I be	came
17	familiar	with when Mr to the best of my knowledge	: it
18	was 1959,	yes, sir."	
19	A	Okay.	
20	Q.	Apart from that one trip in 1959 to Time &	Micro,
21	you never	saw that plant again in your whole life, di	d you?
22	А	Only from the outside, not inside again.	
23	c	Certainly not 1966.	
24	А	No, sir.	
25	Q	1967?	
11		A-1677	

i	jq/lf	Sinkler-Cross 686
2	A	No.
3	Q	Or 1965.
4	A	No.
5	Q	There is no way for you to tell the jury whether all
6	of the ma	chinery which you saw there in 1959 was the same as
7	that mach	dinery withdrawn.
8		There isn't any way for you to testify, is there,
9	sir, that	the machinery which you saw there in 1959 was the
10	same mach	inery that was there in 1966, is there?
11	A	Obviously not.
12	२	But from your experience and your examination of
13	the facil	ities in 1959 what was then there you said was
14	almost ex	clusively machinery and equipment of Swiss origin,
15	right?	
16	A	Yes, sir.
17	Q	Like Hamiltons?
18	A	Exactly.
19	Q	You said to us this morning that in 1966, in your
20	opinion,	there was no market for the machinery and equipment
21	at Time &	Micro, whatever it was, right?
22	А	As shown on this list.
23		THE COURT: Referring to Exhibit 6.
24		THE WITNESS: That is right.
25	Q	And you said that there was no market for it in the
		A-1678
- 11		

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

jq/lf Sinkler-Cross

THE WITNESS: Yes, sir.

Q May I read to you the following questions on page 91 and read your answers to see whether it doesn't refresh your recollection as to when this transaction involving Hamilton really started.

Line 6 -- let me back up to page 90, line 19 or rather line 15:

"Q And as a result of that, being the 1967 tariff cut, you say you" --

A Stopped manufacturing watches.

I am reading your testimony and tell us, the Court and the jury, whether you remember the question I am going to read to you and whether you remember giving the answer I am reading to you.

"Q And as a result of that you say you closed up your plant, right?

"A We stopped manufacturing watches, jeweled lever watches in Lancaster, yes."

Do you remember that?

A Yes.

Q "Q What did you do with that, when was that?

"A The last watch was made in the fall of 1967."

Do you remember that question and answer?

A Yes.

	Jq/lf		Sinkler-Cross 69	90
2	2 Q	"ବ	1967?	
3	1	" A	Yes.	
4		"Q	So that by the end of 1967 you were o	out
5	of the	watch busi	nese, right?	
6		"А	In the United States for manufacturin	107
7	purposes	3."	and the state of t	5
8		Do you	remember that answer?	
9	A	I do.		
10	Q Q	And the	next question:	
11		"Q		
12	the watc		That is enough for the moment, sir.	
13	your pla		I am talking about. Did you dismember	
14	Jour pia	"A		
15	governmen		No, sir. The plant was sold to the	
16	governme			
17			emember those questions and answers?	
18	Α .	Yes, sir		
lø	વ	How about	t this:	
20		"Q	In an aggregate sale or item by item?	
21		" A	Aggregate sale.	
22		"Q	Altogether, right?	
		"A	Yes, sir."	
23		Do you re	member that?	
24	Д	Yes.		
25	6	"Q	As a unit?	
			A-1682	

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

1	jq/lf		Sinkler-Cross 691
2		"A :	That is the manufacturing facility we
3	sold as a	a unit, mad	chines and buildings.
4		"Q	In-place?
5		" A	In-place.
6		"Q	To be used by the government right there?
7		" A	Yes, sir.
8		"Q	You were out of the watch business, right?
9		" A	Yes, sir."
10		Do you rem	member those questions and answers?
11	A	Yes.	
12	Q	Are they	accurate?
13	A	Yes.	
14	c	100 perce	nt truthful?
15	A	Yes.	
16	Q	" ຈ	But the operation continued right there
17	with the	same machi	nery for what further purpose?
18		"A	As a government arsenal for the manufacture
19	of time f	uses.	
20		"Q	That was at the end of 1967, right?
21		" A	Well, the sale was not completed for a
2	couple of	years.	
23		"Q	I understand, but you negotiated from then
24	on?		
25		" A	Yes, sir."
			A-1683

1	jq/lf Sinkler-Cross 692
2	THE COURT: I think we might stop here for a short
3	recess.
4	Q Do you remember those questions and those answers?
5	A Yes, sir.
6	Q And were they truthful, yes or no?
7	A I remember the questions and answers.
8	Q Were they truthful then, yes or no?
9	A Yes.
10	MR. STREAM: All right, now we can take the recess,
11	your Honor. Thank you.
12	(Jury left the courtroom)
13	(In open court - jury present)
14	THE COURT: You may proceed, Mr. Stream.
15	CROSS EXAMINATION CONTINUED
16	BY MR. STREAM:
17	Q Mr. Sinkler, isn't it a fact, sir, that you are
18	not in a position to tell this jury that in 1967 or 1966, for
19	that matter, the machinery and equipment of Time & Micro
20	could not be sold intact, in-place to somebody who had a
21	use for it, isn't that so?
22	A I don't believe it could.
23	Q Don't you remember at the last trial testifying
24	that you couldn't tell that you didn't know, don't you remember
25	testifying?
	A-1684

1	jq/lf	. Sinkler-Cross	693
2	A	I don't remember it, sir.	
3	Q	Let me see if this refreshes your recollection	on.
4	A	Very good.	
5	ର	Top of page 97, and hear the question I put	to you
6	at that t	ime which by the way was in 1975, wasn't it, t	
7	year?		
8	A	Yes, sir.	
9	Q	Page 97, line 2:	
10		The answer is it, meaning the plant	and
11	machinery	of Time & Micro, the answer is it could have	
12		ct as yours, isn't that a fact?	ocen
13		"A No, I didn't say that.	
14		"Q You don't know?	
15		"A He, meaning me, asked me if it could	4
16	sold intac	et to somebody and my answer is I do not know.	
17			
18	earlier th	Do you remember giving that answer to that qualis year, Mr. Sinkler?	uestion
19			
20		Yes.	
21		Answer me this question, was that truthful whe	n
22		statement, yes or no?	
23		Yes.	
24		And when you testified today, sir, during your	
25		mination that nobody would have paid premiums	
	most of the	e items on the list, you meant, did you not, f	or any
		A-1685	

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

2 particular item as an item, isn't that so?

A Yes.

- Q You meant that if somebody wanted to buy a particular item secondhand they might not have paid the price shown in the exhibit, isn't that right?
 - A That is correct.
- You weren't talking about the entire plant intact in-place?
 - A I subsequently did, yes.
- Q You weren't talking about the sale of the entire plant intact and in-place ready for use by another user, were you?
 - A Yes.
 - Q You were talking about that?
- A Both. It came out in the testimony I thought, the first question you asked --
- Don't answer first questions or second questions.

 I beg you, answer the narrow question. Is it your testimony now that there was, to your knowledge, nobody who would buy the Time & Micro facility in 1966 in-place, intact and ready for any operation at all, is that your testimony today or is your answer I don't know?
 - A May I ask a question, your Honor?

 THE COURT: No, you may answer one. You are to

7

9

10

12

14

16

17

19

18

20

22

21

23

25

answer questions, not ask them. If you don't understand a question you may say so.

Q Do you understand the question?

A I don't understand the relationship to the previous question.

THE COURT: Never mind that. That is not your function.

I will do it briefly, Mr. Sinkler. Just listen to my question today and forget about any other answer you may have given before. Here is my question today:

Isn't it a fact, sir, that as you sit here today you do not know whether in 1966 the plant and machinery of Time & Micro could have been sold intact to somebody, in-place, ready for use for the same or different purpose?

A I don't know that.

Q You don't know that? Your answer is I don't know that to be a fact, right?

A Right.

Q Isn't it a further fact, Mr. Sinkler, that when you said earlier today that no one would pay a premium for most of the items on the list of the exhibit which you had before you which I think is Plaintiff's Exhibit 6 in evidence, that no one would pay a premium for any particular item on the

1	jq/lf Sinkler-Redirect 698
2	
3	THE WITNESS: When the government paid us for the
4	plant and we turned over the buildings and equipment to them.
5	THE COURT: When was the contract signed, if
6	you recall?
7	THE WITNESS: '72.
8	THE COURT: When in '72?
9	THE WITNESS: I don't remember the exact date.
10	Q What negotiations took place between Hamilton and
11	the U.S. Government between 1967 and 1971?
12	A Frequent negotiations over fuse contracts.
13	Q But not over the sale of the facility?
14	A That didn't start until later.
15	Q In your opinion, Mr. Sinkler, what was the market
16	for the sale of the Time & Micro plant intact and in-place in
17	1966?
18	MR. STREAM: Same question as on direct and same
19	objection.
20	MR. BRILL: No, your Honor
21	THE COURT: Let him phrase his djection. You
22	interrupt him. It's not courteous, to say the least.
23	MR. STREAM: My objection is that it is not proper
24	redirect. The question was asked and objected to during
۵	direct examination on the grounds that this witness has no
CONTRACTOR DESCRIPTION OF THE PARTY OF THE P	

Jq/1f Sinkler-Redirect 699 expertise and his answer would be speculative in any event. 2 3 THE COURT: Sustained still. MR. BRILL: Your Honor, this man is an expert --THE COURT: I have heard that before. Proceed 6 with your next question. 7 MR. BRILL: This is directed to a specific question with cross examination --THE .COURT: This isn't cross. 10 MR. BRILL: My redirect is directed to one 11 specific question asked by Mr. Stream during his cross 12 examination. Mr. Stream asked Mr. Sinkler --13 MR. STREAM: I would like to have the witness 14 asked a question and no speeches before the jury. 15 THE COURT: Ask your question again please. 16 Q Based on your knowledge of the supply and demand 17 for watches and watch manufacturing machinery during the 18 year 1966, Mr. Sinkler, what in your opinion would have been 19 the market for the sale of an entire watch manufacturing 20 plant in August, 1966? 21 MR. STREAM: Same objection as on direct. 22 THE COURT: Yes, it's speculative. 23 MR. BRILL: It calls for his opinion. 24 THE COURT: He is not qualified for that. 25 R. BRILL: I add that to the list of items to which

jq/lf Sinkler-Redirect

I intend to make an offer of proof.

THE COURT: We will consider it. I don't say I will take the proffer of proof. Just get through with the questions you want to ask on redirect and confine it to redirect.

MR. BRILL: I was attempting to, your Honor.

Q Would anyone have paid a premium for the entire plant as a plant?

MR. STREAM: That is not proper redirect.

THE COURT: That is previously asked.

MR. BRILL: Mr. Stream asked whether anyone would pay a premium for the particular items.

MR. STREAM: That is not so. I objected to his asking questions about what would have happened to the Time & Micro plant if anyone were offered it for purchase. I objected to those questions and the objection sustained. The witness testified that no one would have paid a premium for the plant item by item. That is what he testified to on direct. That is as far as this man can go on redirect. We are not talking about the sale of a plant intact.

MR. BRILL: Mr. Stream asked about that and that is crucial --

THE COURT: I don't want to hear about what is a crucial factor. You constantly comment before this jury.

1

jq/lf

Sinkler-Redirect 701

MR. BRILL: No more so than Mr. Stream.

THE COURT: You win the prize for that.

(Question read)

THE COURT: When?

MR. BRILL: In 1966.

MR. STREAM: I object to the question on the

MR. STREAM: I object to the question on the grounds that this witness is no expert on whether plants can be sold intact, in-place to some unknown persons as a going business as he did with his.

THE COURT: Sustained. He is not an appraiser.

MR. BRILL: He is not being asked a question as an appraiser. It's the same expertise for which he testified for the sale of individual items of machinery.

MR. STREAM: He is being asked an opinion as though he were a broker.

THE COURT: Sustained. Let's go on, counselor.

Q Mr. Sinkler, you testified that there were four leading manufacturers of watches in 1966, what were they relative shares of the markets of each of those manufacturers?

MR. STREAM: Objection.

THE COURT: Sustained.

MR. STREAM: I move the answer as to leading be stricken. That is meaningless unless he explains what is meant by it.

1	jq/lf Sinkler-Redirect 702
2	THE COURT: It's immaterial and irrelevant. Sus-
3	tained on that ground.
4	Q Do you know approximately how many watches Time &
5	Micro manufactured, Mr. Sinkler?
6	MR. STREAM: Objection on the same grounds and
7	the additional grounds that it calls for hearsay.
8	THE COURT: Sustained.
9	MR. BRILL: I request Mr. Stream be directed not
10	to make comments in the presence of the jury while I am
11	attempting to
12	THE COURT: He made it to the court, counselor.
13	MR. BRILL: There was a whispered comment made.
14	MR. STREAM: I spoke to counsel. I won't speak to
15	him again.
16	MR. BRILL: That is all my redirect except for the
17	offer of proof.
18	RECROSS EXAMINATION
19	BY MR. STREAM:
20	Q Let's get the business straight about the dates of
21	your negotiations with the United States Government. You
22	told this jury and your Honor on the direct and redirect that
23	you didn't begin to negotiate until 1971, is that so?
24	A Yes.
25	Q You are absolutely positive that that is the answer

jq/lf Sinkler-Recross you want to swear to as true, correct? 3 A Yes, sir. 4 Q Calling your attention to the questions and answers at the top of page 92 of your previous sworn testimony, 6 Mr. Sinkler, beginning at line 2, and we are talking about 7 the conversion of the government arsenal --8 MR. BRILL: I object to the characterization of the 9 testimony. The actual questions and answers are the key factors. 10 THE COURT: He is going to be asked that if you 11 will refrain and not be so impatient about the coming up 12 of the question. 13 MR. BRILL: I was objecting to Mr. Stream's 14 characterization. 15 THE COURT: He may omit that. Omit it to satisfy 16 counsel. 17 Q Do you remember making this statement sometime 18 previous to this under oath: "As a government arsenal for 19 the manufacture of time fuses," do you remember that state-20 ment? 21 A Yes, sir. 22 Q And that was made in the context of your contemplated 23 transfer of your plant machinery and equipment to the United 24 States Covernment for the manufacture of fuses, isn't that 25 right?

1	jq/lf Sinkler-Recross 704
2	A That is correct.
3	Q Intact, right?
4	A Right.
5	Q In-place?
6	A Right.
7	Q Ready to begin operations, right?
8	A Right.
9	Q And then the following question at page 92:
10	"Q That was at the end of 1967, right?
11	Well, the sale was not completed for a
12	couple of years."
13	Do you remember that question and that answer?
14	A Right.
15	Q "Q I understand that you negotiated from
16	then on?
17	"A Yes, sir."
18	Just answer my narrow question, sir. Do you
19	remember being put that question and giving that answer?
20	A Yes.
21	Was it 100 percent truthful when answered in that
22	fashion, yes or no?
23	A No.
24	MR. STREAM: That is all.
25	THE COURT: That completes, I believe, this witness'
	A-1697

J9/1f 716 over the amount of money gotten at the auction sale. 3 tricky and sneaky. THE COURT: Let me repeat, Mr. Stream, you do not wish to question the amount of money received from the sale 5 6 of these remaining items and credited? 7 MR. STREAM: There is nothing in the record one way 8 or the other. 9 THE COURT: I will sustain the objection. The 10 letters are unnecessary. Is there any other exhibit? 11 MR. BRILL: No other exhibits, only the offer of proof. 13 THE COURT: I don't know why you have to throw 14 that in every two seconds. 15 What is the first offer of proof that you want to 16 make? State it in general terms. 17 MR. BRILL: The first offer of proof is that I will 18 prove through Mr. Sinkler that during August of 1966 --19 MR. STREAM: I want the witness who is present 20 excused from the courtroom. 21 THE COURT: Yes, you step out, Mr. Sinkler. 22 MR. BRILL: During August of 1966 watch manufacturers 23 in the United States expected that the tariff on imported 24 watches would be lowered. 25 THE COURT: What is the question you propose to ask?

18

19

20

21

22

23

25

717

THE COURT: What was whose prognosis? A-1699

2

1

3

4

5

6

7 8

9

10

11

12

13

14

15

16

17

it.

18

19

20

21 22

23

24

25

MR. BRILL: The prognosis within the industry.

MR. STREAM: That isn't expert testimony. That calls for pure speculation as to the future.

THE COURT: Sustained.

Any other proffers?

MR. BRILL: Yes, your Honor. I want to proffer
Mr. Sinkler's testimony that the equipment, specialized watch
manufacturing equipment such as that shown --

THE COURT: Such as what?

MR. BRILL: Such as the equipment listed in Plaintiff's Exhibit 6 is useful only for the manufacture of precision watches or for timing devices to be used in fuses.

MR. STREAM: My objection to that was that the witness shows no expertise in the engineering field.

THE COURT: I don't remember what he said about

MR. BRILL: He wasn't allowed to answer the question.

MR. STREAM: I objected to the question on the grounds it called for engineering expertise and this witness has none at all.

This witness is an expert in marketing but he isn't an expert in the utility and capability of engineering machinery and equipment. He has no expertise as an engineer. I, therefore, object to it on the grounds it lies outside of

3 pure speculation on the part of the witness.

MR. BRILL: Mr. Stream may recollect the testimony that Mr. Sinkler is an expert only on marketing but he served as vice president of manufacturing and general manager of the fuse division in Hamilton and his expertise extended beyond marketing.

THE COURT: I may decide to allow that. I am going to withhold just now.

Any others?

MR. BRILL: One or two more.

I would proffer Mr. Sinkler's testimony that in his opinion no one in the United States in August of 1966 would have been interested in opening new facilities for watch manufacturing or fuse manufacturing.

MR. STREAM: I find that the most objectionable of all possible questions. How can this man be allowed to testify that nobody would do nothing or nobody would do anything?

An opinion deals with a state of known facts. It doesn't deal with a statement of a fact and future. This witness should not be allowed to get up and testify as an expert that nobody would do anything or nobody would do nothing.

. 17

one.

THE COURT: I will sustain the objection and sustain the objection to the proffer.

MR. BRILL: One other question. I proffer, your Honor, that the timing device, the timing mechanism on the M524 fuse could be manufactured on machinery less specialized than the machinery contained in the Time & Micro plant.

THE COURT: What is the question you want to ask?

MR. BRILL: The question would be two questions,

can the time mechanism for the M524 fuse be made on other

machinery other than that contained in the Time & Micro plant
and the second question if so, what other types of machinery

can be used to manufacture this timing mechanism.

THE COURT: What's the objection, qualification?

MR. STREAM: Not only qualifications but it's irrelevant and immaterial that the fuse contract could ever be performed by somebody alse because it was given to Ajax and Ajax hired Time & Micro as a subcontractor. The fact that it could have been done by somebody else has nothing to do with this case.

THE COURT: I sustain that.

We go back to number 5. Refresh my recollection on that

MR. BRILL: I don't have them numbered that way.

THE COURT: Whatever it was that I said I would

1

6

7

10

9

11

13

15

16

17

18

20

21

22 23

24

25

MR. BRILL: May I request that I be served with a copy of defendant's requests to charge which were stated would be served on me at the conclusion of my case.

MR. STREAM: I will do so.

THE COURT (es, exchange the requests to charge and be prepared on your motions.

MR. BRILL: Will you rule on the proffer before lunch so Mr. Sinkler might leave or do you want him to wait until after lunch?

THE COURT: I am going to reject that application on the proffer about other uses.

MR. BRILL: Thank you, your Honor. Come back at 1:30 prepared to make any motions, to give any citations to support these motions.

MR. BRILL: May I ask whether Mr. Stream intends to call any witnesses this afternoon?

THE COURT: Let him make his motion and let me decide that first. He doesn't have to tell you now.

MR. BRILL: I was forced to tell the Court and the defendant every day what witnesses I intended to call.

MR. STREAM: I really don't know. It depends on the outcome of the motions.

THE COURT: I don't compel him to tell you whether he is going to call any witnesses or not at this moment. You

may tell Brother Sinkler that he may go now.

Ask him to come in here and I will tell him.

It has become unnecessary for you to give any further testimony, sir. You may go back to your work at the college.

(Luncheon Recess)

Ajax vs. 1
Ir istrial Plants
Judge Levet 2
9 Civ. 1900
10/20/75 3

AFTERNOON SESSION

1:30 p.m.

THE COURT: All right, Mr. Stream.

MR. STREAM: If the Court pleases, I am going to make a series of motions, your Honor, and I think that with your permission I m going to divide them into two parts. My first motion will be a motion made under rule 15(a) of the Federal Rules of Civil Procedure which provides -- I correct myself, 15 (b) of the Federal Rules of Civil Procedure which provides in its essential part as follows: (b), entitled "Amendments to Conform to the Evidence," when issues not raised by the pleadings are tried by express or implied consent of the parties they shall be treated in all respects as if they had been raised in the pleadings.

THE COURT: I am familiar with that. In fact, I had something to do with the same rule in another case of Mr. Gartner's. In any event, I am familiar with it.

MR. STREAM: Upon the basis of Rule 15 (b) I move inbehalf of the defendant to conform my answer to the evidence and in that connection once again seek leave to add as a defense in this action the fact that as a matter of law the plaintiff is barred from bringing action for a breach of contract waiver. I am not unfamiliar, your Honor, with

A-1705

jq/lf

2

3

5

6

7

8

10

11

12

13

14

15

16

17

18

19

20

21

22

23

the principles of law which says that payment alone will not constitute a waiver of a contract provision. But whereas in the case at bar the plaintiff's proof has established that not only was there a payment made but that payment was made with knowledge, with knowledge, that the appraisal which was prepared by the defendant was a fair market value appraisal and was not the appraisal of liquidating values, and where the evidence is clear both testimonial and by document that the vice president of Ajax, the plaintiff in this action knew that it had received a fair market value appraisal, and made no objection thereto or having objected thereto nevertheless accepted the appraisal, and having the power and authority to accept or refuse payment, instructed the officials or the subofficials of Ajax to pay the invoice of Industrial Plants which, I might add parenthetically made reference to the computation of the invoice rum upon the basis of a fair market value appraisal, I say that in such circumstances the defense of waiver is clearly applicable and should be allowed in this case. I might add that motions to amend so as to conform pleadings to the proof under the federal rules are now not only to be granted as a matter of discretion but in the words of the rule shall, and that rule is emphasized by me, freely be done in the interest of justice, and as the cases establish, actual prejudice, actual

25

prejudice, must be shown to prevent the making of that amendment effective. I cite Caldwell against Sears Roebuck, 31

Fed. Sup. 888 and Reed against Kellerman, 40 F. Sup. 46. I point out to this learned Court, as I am certain the Court remembers and knows, that even though the party objecting to the amendment shows that it is not prepared to meet the evidence caused by the interposition of such a defense the answer of the Court should be to allow a continuance, if one is sought, but not to deny the granting of the amendment. I cite in that connection Watson versus Cannon Shoe Company, 165 Fed. 2nd 311.

THE COURT: Is that all about that motion?

MR. STREAM: Yes, your Honor.

THE COURT: Reserved.

MR. STREAM: Insofar as the plaintiff's case is concerned, I move at this time for a dismissal of each and all of the plaintiff's three counts upon the ground that the plaintiff has failed entirely to make a prima facie case on each and all of those counts and I move further under rule 50 for a directed verdict upon the ground that as to each and all of the stated counts the plaintiff has offered no substantial evidence to support a recovery by it on any of those counts. I state that the reasons for that motion and the detailed grounds for my requesting that belief are as

10

U

12

13

14

15

16

17

18

19

20

21

22

23

24

25

follows: to begin with, insofar as all three counts are concerned, it's a well established rule that a motion for a directed verdict must be granted as a matter of law where all of the facts which the plaintiff's evidence reasonably tends to prove and all inferences which may reasonably be drawn therefrom must are resolved in the defendant's favor.

I cite to this Court Neilson versus Richmond, 114 F 2nd 343 at page 345 and Elsig versus Goodwagon, 19 Fed. 2nd 434.

MR. BRILL: The inferences have to be drawn in the defendant's favor, did I hear you right?

MR. STREAM: May I continue?

MR. BRILL: I want to find out if I heard you correctly.

THE COURT: What is it?

MR. BRILL: I don't know if I heard him correctly, your Honor.

MR. STREAM: I will restate the proposition. A directed verdict in favor of the defendant must be granted where all the facts which the plaintiff's evidence reasonably tends to prove and all the inferences which may reasonably be drawn therefrom must be resolved in the defendant's favor.

There are three counts in the plaintiff's complaint.

The first count is a claim of breach of contract. The second count is a claim of negligence. The third count is a

4

5

6

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

claim of fraud.

First as to the first count of the complaint. The complaint itself establishes the basis for the granting of this motion which is made in behalf of the defendant. Ajax alleges in the first count of its complaint that on or about August 12th, and that is paragraph 4-A of its complaint, that it entered into an oral agreement with Industrial Plants under which Industrial Plants agreed to appraise the machinery and equipment in the Time & Micro plant and to advise and report, and I quote the complaint, "The true market value thereof. I point out to the Court that the complaint does not allege any agreement to appraise and report the appraisals based upon liquidating values, either forced liquidation or orderly liquidation. They talk about true market value. This Court will remember that the plaintiff's own expert, Mr. Sinclair, described the various appraisals in these terms. He said fair market value is meaningless unless it is used in connection with an appraisal for on-site use or off-site use but, he said you don't talk about fair market values when you talk about appraisals for liquidating purposes. There you talk about appraisals for liquidating purposes at an orderly sale and liquidating purposes at a forced sale.

I point out further in the complaint that it is alleged at paragraph eleven, if the Court pleases, that the

1 | jq/lf

appraisal which the defendant rendered, the appraisal which the defendant rendered, was, and I quote, "The fair market value of the plant facilities at \$1,056,000," and then the complaint alleges that there was a forced sale in liquidation some fourteen months later.

Since the plaintiff by its complaint alleges that it engaged the defendant to do a fair market value I could rest on that alone because if there was anything in this record that was clear beyond a peradventure of doubt, if there is anything in this record, your Honor, that lacked a scintilla of contradictory evidence, it is that the plaintiff rendered a fair market value appraisal.

MR. BRILL: You mean the defendant.

MR. STREAM: The defendant rendered a fair market value appraisal.

Mr. Klein acknowledged under oath that a fair market value appraisal was rendered. The letters introduced into evidence dated subsequent to the appraisal indicated that notwithstanding a fair market value appraisal the plaintiff wanted something else. It also sought liquidating values as a matter of opinion, not as a matter of contract right. Those letters indicated that the defendant was being asked through Mr. Thaler also to indicate whether in his opinion there was a basis for determining the dollars for an

jq/lf 729

appraisal based upon liquidating values at a forced sale in liquidation.

THE COURT: I want to stop a minute. It seems to me that this is going to be a lengthy argument on both sides and that I shall let the jurors go home.

Any objection?

I hear no substantial objection. Get the jurors in here. I will tell them there are legal matters which the Court must decide.

MR. STREAM: Yes, that is true.

(In open court - jury present)

THE COURT: I want to say this to the jurors: the time has now come after the completion of the plaintiff's case where there are various legal matters which the Court must decide after hearing counsel in respect to those legal matters. My estimate is that this will consume time all of the rest of the afternoon and I am not going to keep you waiting in the jury room twiddling your thumbs until that has been done. You may go now to return tomorrow at about five minutes of ten. Keep in mind all of my instructions and adhere thereto.

Thank you. You may go.

(Jury left the courtroom)

MR. STREAM: Your Honor, I point that out not only

A-1711

2

3

5

6

23

24

22

2

3

5

7

8

9

because of the statements and the correspondence which was offered, I might point out parenthetically by plaintiff's counsel as plaintiff's exhibits, those are the letters of Mr. Klein and Mr. Louis, both of whom acknowledged that they had received fair market value appraisals but asked if they could also get values at a forced sale in liquidation. point out that at no point in any of that correspondence did either of those gentlemen say we object, you have broken the contract, you gave us that which we didn't ask for. There is nothing in that correspondence to support the plaintiff's claim of a broken contract. We have beyond that, your Honor, the admissions of the former vice president of Ajax, Mr. Howard Klein, who during direct examination said that if there was one thing he knew it was that he never received a valuation appraisal of liquidating values at a forced sale. Those were his words and his own testimony. He said that Ajax never got an appraisal reflecting itemized values for a forced sale in liquidation.

Under those circumstances, your Honor, where a plaintiff alleges that a defendant such as Industrial Plants was retained to prepare a fair market value appraisal and prepared a fair market value appraisal and where the plaintiff obligee received a fair market value appraisal and where it is acknowledged that that fair market value appraisal could under

A-1712

22

19

20

21

23

24

3

5

6

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

no circumstances ever be used as a test or as a yardstick or as guidelines for the determination of values at a forced sale in liquidation, I say that the plaintiff has failed to establish a case even prima facie, even by so much as a scintilla of evidence much less by the substantiality of proof required to submit a case to a jury that there has been a breach of that contract, because they got what they asked for and they paid what they bargained for.

The second count, your Honor, pleads negligence. I respectfully contend that not only is there no substantial evidence to support a recovery by the plaintiff on its second count of negligence, I suggest that there is not one single fact or one single statement made by any witness in behalf of the plaintiff that regardless of the ways in which that appraisal of Industrial Plants was prepared one single figure in that report was wrong, inaccurate or untrue by so much as one single penny. Each witness, this Court will recall, said that so far as they knew as a fair market value appraisl they could not speak to the accuracy or inaccuracy of any of the figures. Mr. Sinclar went to great lengths to describe his blueprint to heaven, what I called it, the perfect appraisal, what the perfect appraisal should have in it. We will save for another time an argument as to what his own appraisal showed and simply remind this Court in this motion

25

to dismiss, and this composite motion for a directed verdict, that the one thing Mr. Sinclair was that he never saw the equipment and that he could not derrogate or support or disagree with one single figure in the appraisal rendered by the defendant and marked into evidence as Defendant's Exhibit 6 or rather Plaintiff's Exhibit 6. I add to that my contention that there is not one single fact and not so much as an inferential statement by Mr. Klein, or for that matter by Mr. Sinclair, to show that the failure of Industrial Plants -- Mr. Thaler, I forget his first name -- Jesse Thaler, that the appraisal prepared by Jesse Thaler despite the possible omissions of some of the particulars which plaintiff's expert felt were so important, that that appraisal contained any error or in any way confused, misled or misinformed the plaintiff, Now I am talking to the subject of negligence. Here is a party that comes into Court and says that they were damaged because of the negligent way in which an appraisal was prepared. There isn't a word in the record to show a fundamental reliance on the appraisal to begin with and there isn't a word in the record to show that whether or not the appraisal contained the columns and the underlying data which the expert felt might have helped to inform that the appraisal was wrong in one single particular and finally, your Honor, even assuming arguendo that it was

wrong in one or more particulars there isn't anything in the record to show that the plaintiff relied upon it or could have. Indeed, the record makes it clear irreversibly through the testimony of Mr. Klein that he never got an appraisal reflecting the individual itemized liquidating values of that machinery and equipment for purposes of forced sale and liquidation and that is in the record.

THE COURT: I want to ask you a question at this point. This is the relationship of this claim of negligence to the claim of breach of contract. If there is no breach of contract is there any negligence?

MR. STREAM: There can be no negligence. If the plaintiff received -- the way I see it is this: if this plaintiff received a fair market value appraisal and it asked for it and it got it the case must end there because there isn't anything in the record to warrant a submission to the jury of the question of whether Ajax relied upon it because we know that Ajax didn't rely upon it, did not rely upon it. We know to the contrary that Mr. Klein said he never got an appraisal showing values of items for forced sale and liquidation. If Mr. Klein knows that he didn't get that he sure couldn't rely upon a fair market value appraisal to establish values for liquidating values at a forced sale. I don't ask you to accept my word for it. I expect this Court

Jq/1f 734

to remember that Mr. Klein so testified and Mr. Sinclair said under no circumstances can a fair market value appraisal ever be used as a factual predicate for even guessing at what items would bring at a forced sale under an auctioneer's hammer.

Upon those facts alone we say that the plaintiff cannot make a prima facie case and has not developed sufficient factual substantiality to warrant allowing that count to go to the jury. I speak to one more aspect of the negligence count, and that is the aspect of fact negligence itself. The case of fact negligence is based, as I understand it, upon the fact that the defendant didn't list certain categories, didn't do the things that this expert wanted it to do. But the law is clear that what is expected of a person depends upon the circumstances under which the services are to be rendered. Where, as was the case at bar, an appraiser is retained on a Friday and is told that he must do his appraisal on the following Monday and is told that despite his statement that he might need a week or two to be ready he is to do it and where he is given the basic data with which to do it, where he is given the categories, the values, the items which underlie the machinery and equipment prepared by an appraisal, by a company of renowned, prepared two years before by a company of renowned, and it did have

24 25

1

2

3

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

jq/lf

1

2

15

16

17

18

19

20

23

24

25

735

renown, both Sinclair and Klein acknowledged that this company was one of the only companies in the country to engage in 3 the importing and sale of Swiss manufactured machinery and 5 equipment meant for use in precision instrument manufacturing. 6 Where data and appraised values are given by a customer to 7 an appraiser and he is told to update it and where the records 8 show that each and every item was studied and reviewed within 9 the allotted time absent a shocking disregard for the 10 realities of the situation there cannot be said that there is 11 an inference of negligence sufficient to warrant sending 12 a case to the jury. I put that apart from the fact 13 that I have said before that even if this were the case and 14 there were negligence in the preparation of the report, there

upon that appraisal for forced sale in liquidation because,

is no way that the jury can get to this case on that count

saidle, I never got those values and his expert said they

because the plaintiff made it clear that he did not rely

could never rely upon the fair market value appraisal for the

purposes of developing forced sale values at liquidation.

21 THE COURT: Let me ask you this, Mr. Stream, and

22 you may answer it now or later if you plan otherwise: was

there a reliance upon whatever appraisal the defendant may

have made or did he sign the guarantee agreement before

receiving the appraisal?

A-1717 '

24

25

MR. STREAM: I could argue at some length as to the question of whether he did that. I am going to argue it briefly. I am going to put aside this matter of the telegram because whether the telegram was received on the 18th of August or was received, as I believe it was, on the 19th of August, and despite the fact that all parties agree that it was sent on the 17th of August is beside the point. Because, said Mr. Klein in his testimony both before trial and in this courtroom, because said he, I didn't want, and I told Mr Thaler, I didn't want an appraisal of overall values, I said to him -- and I am speaking substantially in the words that Mr. Klein used in this courtroom -- he said I told Thaler that I wanted to get item by item values of the plant -of the machinery and equipment at the Time & Micro plant and I needed that to decide whether to go ahead with the guarantee. On the 18th of August or on the 19th of August, whichever day you care to accept, he had not received that appraisal. All that he got was a telegram. If he testified that he needed to have an item by item appraisal of any kind before going ahead I say to this court he went ahead on the basis of a telegram without the very appraisal that he ordered and without the very appraisal which he said he needed in order to decide whether to go ahead with the guarantee.

THE COURT: What ou are saying is that he went ahead

without the detailed appraisal.

MR. STREAM: The record is clear that the actual appraisal arrived the following Monday, the 21st of August, along with a transmittal letter. Both the letter and the appraisal were dated August 19th. They could not have been received before the 21st or the 22nd. Even if he had reversed his transaction, which he didn't, and said well, I changed my mind and I relied on the telegram, it doesn't cut any ice because the telegram stated fair market value on-site, and used those words. And there was no way in the world that a man could have used an on-site fair market value appraisal to determine liquidating values.

So far as the fraud count is concerned, I consider it to be a travesty. I state categorically that there isn't a scintilla of proof to show a false or fraudulent statement or representation. There isn't a scintilla of proof to show the required scienter on the part of the defendant, a knowingly false or fraudulent statement and there isn't a scintilla of proof of reliance uppn a knowing false or fraudulent statement. Under the circumstances I not only suggest that the complaint fails to state -- that the case fails to reflect a sufficient substantiality to require a submission to the jury so that a directed verdict is proper but that the plaintiff has so entirely failed that the complaint has to be

dismissed as a matter of law for failure of the plaintiff 3 to make a prima facie case on that count.

1

2

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I say that overlying all of these considerations we have one dominant consideration and that dominant consideration already in the record in the form of Defendant's Exhibit I establishes that the plaintiff received over \$249,000 from the United States Government. I will address myself to that in this fashion: we have alleged by way of deference that the plaintiff has failed to demonstrate that it has suffered financial loss in this transaction. The plaintiff claims that it entered into a guarantee in reliance upon an appraisal. The facts in no way support that at all. What the facts support is the following: that the plaintiff in expectation of receiving a \$3,000,000 government contract which was probably already in negotiation, and which became a reality a i a signed document in October of 1966, had selected Time & Micro to use as a critical subcontractor to make a critical subpart called a timing mechanism.

The plaintiff was sufficiently excited about the transaction that even before, even before, it signed up and entered into an agreement with Time & Micro to help him finish a \$270,000 loan, even before that happened, they were negotiating a joint venture deal that would give them an opportunity to become a co-owner of Time & Micro. I point out to the Court

that the so-called loan and security agreement signed on August 18th, the one we talked about before when I said they signed up with Time & Micro to guarantee a loan or to make a loan even before they got the appraisal which Mr. Klein swore he had to get before he could make that decision, that in that so-called loan and security agreement was the statement of a partnership agreement, was the statement of joint ventureship, was a reflection of an agreement on the part of Time & Micro to allow Ajax to buy up to 15 percent of the stock of that company, to use that facility rent free throughout the term of the loan and I point out, your Honor, that it was in reliance upon the government contract to come and upon the opportunity to joint venture that deal with Time & Micro that Ajax decided to advance \$270,000 to Time & Micro and we don't even know to this day for what purpose that money was advanced. No way is there anything in the record to show what the \$270,000 was advanced for. But we do know that when the loan and security agreement was signed by Time & Micro and Ajax, Ajax didn't use the Industrial Plants' appraisal. The attachment to the Time & Micro loan agreement was of the appraisal done two years before by Hirsch mann Corporation. How plaintiff upon that record can hope to show reliance upon an appraisal of Industrial Plants is simply beyond my comprehension. This Court need only take a look at

the exhibit that I have in mind, which is Plaintiff's own 2 3 Exhibit 4 in evidence, and to compare it with Plaintiff's Exhibit 1 and 1-A to see that Plaintiff's Exhibit 1 and 1-A, which is the Hirschmann appraisal, is exactly what is attached 5 6 to the loan and security agreement which made Ajax and Time & 7 Micro partners and we say those were the transactions upon 8 which Ajax relied, both the government contract to be and 9 its opportunity to joint venture the deal, those were the 10 opportunities and the factors upon which Ajax relied when 11 it decided to help with a \$270,000 loan guarantee. I will 12 prove it further, your Honor, by pointing out to you that the 13 guarantee which was eventually signed or which Ajax agreed 14 it would sign in Plaintiff's Exhibit 4 was to be for \$270,000 15 for 12c days. Why 120 days? The Court will remember I asked 16 Mr. Klein, why 120 days? Where are you going to get the 17 money from and he threw up his hands and said I don't know. 18 There is only one inference to be drawn from that. The 19 only possible source from which that loan could have been 20 paid would have been payments paid by Uncle Sam to the 21 prime contractor Ajax and from the prime contractor to Time & 22 Micro under the fuse job. That is what the guarantee was 23 meant to expect. That is what the guarantee relied upon. 24 The appraisal meant nothing. The fact of the matter is that 25 the appraisal went to the bank which did the lending because

1

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

22

23

24

25

the loan agreement between Time & Micro and the First Western

Bank and Trust Company of California has the Industrial Plants'

appraisal attached to it. The bank relied upon it to make

a \$720,000 loan, not Ajax.

So having demonstrated that there was a reliance by Ajax upon the government contract and upon repayment of the loan from government funds coming through, properly coming through, Ajax to Time & Micro as a subcontractor, we say that every dollar which Ajax got because that contract was thwarted abate the damages in this case and they did get much money from Uncle Sam. Mind you, your Honor, they weren't awarded this contract until October 11, 1966. Less than two months later it was all over because the contract was awarded on October 11th and on December 30th Uncle Sam said all bets are off. I challenge this plaintiff, and the record is entirely silent, to demonstrate that it spent one nickel in the performance of that contract but it received \$249,000 plus from Uncle Sam and I challenge the plaintiff to show in its record on its own case that it paid over one penny of that \$249,000 to anybody and that is why I say mitigation, no damages, even if they had a recovery on counts 1, 2 and 3, no damages. Those are the reasons that I stand here and make this meaningful motion so far. As the claim of the plaintiff to punitive damages are concerned, I regard it as little short

1 Jq/1f 742 of ludicrous and so totally lacking in a factual record as to require this Court certainly to take that issue from the 3 jury. 5 Thank you. 6 THE COURT: Mr. Brill. 7 MR. BRILL: If I may, your Honor, I would like to reserve the discussion of the motion to amend the pleadings 8 9 until the end of my response. 10 THE COURT: Well, if you want to rearrange it, okay. 11 MR. BRILL: Let's start out with the motion to 12 dismiss all of plaintiff's three causes of action under rule 13 50. I am not here to give a closing statement, your Honor, 14 or to argue what inferences --15 THE COURT: It's a motion and I think there are 16 serious motions. I am not going to deceive you. 17 MR. BRILL: Excuse me? 18 THE COURT: I said I think they are serious motions. 19 I didn't say I agreed with the defendant but I think the 20 motions are serious. 21 MR. BRILL: Of course, the point is, the question 22 is is there evidence in the record, is there evidence which 23 supports the plaintiff's claim and from which inferences can 24 be drawn to support it. 25 THE COURT: In support of the complaint.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

1 jq

true and accurate appraisal of the machinery and equipment owned by Time & Micro with which plaintiff was considering entering into a loan agreement if the machinery and equipment

ceeds of at least \$250,000

22 23

would be adequate security for the contemplated loan.

On August 12, 1966, the pretrial order contention goes on, the plaintiff informed the defendant that it wanted to know specifically whether at a forced sale the machinery and equipment would have sufficient value to assure net pro-

THE COURT: May I just interrupt this statement of yours. These are contentions. These aren't facts.

MR. BRILL: These are the contentions which the plaintiff makes.

THE COURT: All right. It's more than that. This motion goes not only to the complaint and its claims but it goes to the facts and the Court is compelled to review the testimony to see if it supports the claims. Don't forget that.

MR. BRILL: What I am attempting to show, first of all, is what are the claims. The claims are those in the complaint and as the complaint is amended and elaborated by the pretrial order. Moreover, the claims even in the initial complaint filed in 1969 are not quite as Mr. Stream selectively read them to you, your Honor. I would point out paragraph (b).

1

THE COURT: Of what?

3

MR. BRILL: Of paragraph 4 of the complaint which

4

Mr. Stream did not read. That is 4 (b), your Honor.

5

Prior to the time that plaintiff and defendant contract --

6

THE COURT: Where is there any proof that plaintiff loaned \$270,000 to Time & Micro?

8

MR. BRILL: Or arranged for such a loan guaranteed

10

by plaintiff, your Honor. If and only if an appraisal of the aforesaid machinery and equipment to Time & Micro which was

11

to secure such loan showed a value substantially in excess

13

of the face amount of the loan plus interest and the expenses

14

of liquidation which could reasonably be anticipated thus

15

removing any substantial risk to plaintiff in making or

16

guaranteeing such loan and then paragraph 5, defendant

17

undertook and agreed with plaintiff that it would make an

18

appraisal of the aforesaid machinery and equipment to Time &

19

Micro in a careful, accurate, skillful, et cetera, manner

20

having in mind the particular purpose for which plaintiff sought said appraisal and render a report thereon.

21

THE COURT: All right.

23

MR. BRILL: Let me stop there for a minute because that is a quote out of the original complaint as it was filed some six years ago.

24 25

14.

The breach of contract claim is not necessarily as Mr. Stream seeks to put it into a very narrow, constricted path we are saying one thing in breach of contract. This is one way of viewing the breach of contract claim that the jury may accept. As Mr. Klein testified he told Mr. Thaler the purpose of this appraisal. In fact, Mr. Thaler's own testimony is that yes, he was told the purpose of the appraisal. It was to determine the collateral value of this machinery so that is the contract.

THE COURT: The collateral --

MR. BRILL: The value, what it would be worth, would it be sufficient collateral of a loan of approximately \$250,000.

THE COURT: Whose testimony was that?

MR. BRILL: Both Mr. Klein and Mr. Thaler. There is no dispute on that fundamental point, your Honor.

THE COURT: All right. I have your point.

MR. BRILL: I will read it to you from Mr. Thaler's deposition.

If the defendant did not supply the proper type of appraisal for our stated purpose that is a breach of contract. That is a fundamental breach of contract because it is the defendant's obligation to know what is the proper type of appraisal to supply once the client has stated its purpose. ~

jq/lf

You will remember not only Mr. Sinclair's testimony but the very specific statements in the A.S.A., the American Society of Appraisers, principles.

THE COURT: That is not law, though.

MR. BRILL: No, your Honor, but it is a statement of a professional society of which the defendant, Mr. Thaler, or the defendant's appraiser, Mr. Thaler, states right at the beginning of his own list of qualifications that he is a senior member of that society. Someone looking at that list of qualifications is entitled to expect that he will follow the principles and standards and ethical procedures of that society, your Honor. So that it is relevant to this case.

THE COURT: It depends on what the contract was, counselor.

MR. BRILL: Of course. I am saying under one theory-

THE COURT: I am glad you say of course.

MR. BRILL: Under one theory, your Honor, we have proved a contract which we are entitled to go to the jury and have the jury decide was that the contract and was it breached. Was the contract as follows, Ajax employed, engaged the defendant to give us an appraisal which would tell us whether that machinery and equipment was adequate as collateral for a loan of approximately \$250,000. That is one possible contract.

A-1730

. THE COURT: Two types of appraisal?

25

MR. BRILL: One appraisal with two different types

1 J9/1f 750 2 if I may go to the blackboard --3 THE COURT: Never mind blackboard pictures. This 4 is not a primary school. 5 MR. BRILL: Klein's testimony and Thaler's testimony 6 and there is an area of overlap. 7 THE COURT: So it could be anywhere in-between, 8 is that it? 9 MR. BRILL: The contract could be as Mr. Klein 10 says, everything that Mr. Klein says contained in this 11 circle or it could be everything that Mr. Thaler says. 12 THE COURT: In other words, you are suggesting 13 that the jury compromise this thing? 14 MR. BRILL: No, your Honor. The jury has to determine 15 which is the credible version. 16 THE COURT: All right, as long as you say which is 17 credible that is one thing. When you propose some third 18 rail business here that is another thing. 19 MR. BRILL: What I am saying is that the plaintiff 20 does not insist that the contract was -- that there was one 21 specific contract and that is all the jury can find. 22 THE COURT: I don't know what you mean but go ahead. 23 MR. STREAM: He means God willing the jury will find 24 something else. 25 THE COURT: Please don't interrupt, Mr. Stream.

MR. BRILL: Mr. Stream insisted that the only evi-

Go right on, Mr. Brill.

dence was that the plaintiff asked for a "fair marke value appraisal" and that the defendant received a "fair market value appraisal." Well, your Honor, that is simply not what the evidence shows. The evidence shows by Mr. Klein's testimony that he asked Mr. Thaler, and I repeat, he asked Mr. Thaler for several things --

THE COURT: That is if the jury believes Mr. Klein.

MR. BRILL: But that is the issue in this motion.

THE COURT: I don't think it's the issue.

MR. BRILL: The issue is not whether the jury will believe Mr. Klein but the issue is whether there is evidence to go to the jury.

THE COURT: Some evidence.

MR. BRILL: Mr. Klein testified that he asked for an appraisal of the values which -- an appraisal showing the forced sale, the liquidation values of this machinery and he testified that he told Mr. Thaler that he wanted to have an appraisal as to what or whether the machinery would be adequate security as collateral for a loan. That is his testimony to the original conversation on August 12th, to the original contract. Now Mr. Stream says there is no evidence that Ajax got anything but a fair market value appraisal.

2

3

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

Let's look at the evidence as to what ' ax got. Number one, Mr. Klein testified he received a phone call on August 16th from Mr. Thaler which is the first time he got the values from Mr. Thaler in which Mr. Thale, said the fair market value or high side value, \$900,000, forced sale value, there it is the first time, forced sale value, \$500,000 approximately. Then we get a telegram sent on August 18th which says the fair market value is approximately \$900,000, the in-place value which is something other than the fair market value is over \$1,000,000. Then he tells us it is 1 conceivable that the value could be less than 60 percent of this. And he gives us additional assurances as to why that is so, as to why this is valuable machinery, confirming his phone conversation. The jury, as Mr. Klein, is entitled to draw the inference to read that telegram that certainly inconceivable means any type of value, means any type of disposition of this machinery and that includes the forced sale value. In fact, the 60 percent of \$900,000 is almost identical to what Thaler told Klein the previous day on August 16th in the phone conversation. Mr. Stream makes a big thing that Mr. Klein testified he never got the liquidation values that he asked for, and that is true. But what did he get? He got again -- first of all, on August 23rd Mr. Louis wrote he didn't say give us something new, all of a sudden we want

24

25

the liquidation value, the forced sale value. He said as Mr. Klein discussed with you we want the forced sale value, we want it spelled out the way we expected to get it. This wasn't something he was adding for the first time. Then what did Klein get after that? Did he simply sit back and say yes, well, I got an in-place appraisal, that is fine, everything is dandy? No. He called up Thaler and said your appraisal is not in complete conformity with my instructions, it doesn't give me the two values, two columns that I asked for. He said, and this is his testimony, all I got was a lump sum liquidation value of \$500,000. Thaler confirmed the value to him at that point. Then the next day Klein spoke to Kriser on the telephone on August 30th and again he said you know there is some ambiguity in this appraisal, you are talking about its inconceivable that the value could be any less than 60 percent of the individual figures that we appraised, that people would pay premiums for this individual pieces of machinery and equipment, that the equipment was practically impossible to obtain, that it was subject to some Swiss trust, import restrictions, it would take two to three years to get the equipment, that, in fact, there was no other plant in the whole country which was equipped the same way as this plant was.

Even so, the next day on August 30th, Mr. Klein

spoke to Mr. Kriser and he said well, I am not quite sure. 3 I have a preliminary understanding with Time & Micro, and this is Mr. Stream's own point, that Ajax signed the 4 loan and security agreement on August 18th but it could have 5 6 gotten out of that loan and security agreement. it could have 7 changed its mind at any point up to September 9th. So on 8 August 30th Mr. Klein spoke to Mr. Kriser and he said can I go ahead and guarantee this loan, is this a good appraisal, 10 is it giving me what I think it gives me, I don't have the 11 individual liquidating values but at least can I be sure 12 that the liquidation value as a whole is \$500,000, that I 13 can put my money up on this machinery and Kriser says don't 14 worry, we have done appraisals for banks for collateral in 15 the past, I will give you the names of some officers to 16 talk to at some banks. In fact, I am going to send you out 17 a letter special delivery air mail talling you this is a 18 sound and scientific appraisal, you can rely on it, you can 19 be assured that it's a sound appraisal. He didn't say this 20 was a rush job, we don't know what it's worth be t's based 21 on what you told us it was worth. He said go ahead, it's 22 a scientific appraisal, rely on it. That is right Mr. Klein 23 never got the individual list of liquidating values that he 24 asked for but his testimony is clear that he thought he got 25 not only a liquidation value but assurances, repeated assurances

A-1737

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

755

jq/lf

1

question, counselor.

3

1

If there is a compliance with the contract can

4 5

there be negligence?

MR. BRILL: Yes, there can, your Honor.

6

THE COURT: I can't understand you but go ahead if that is your best answer.

7 8

9

10

11 12

13

14

15

16

17

18 19

20

21

22

23

24

25

MR. BRILL: There can because let us assume that Mr. Klein said to Mr. Thaler we want this appraisal to know whether the machinery is adequate as collateral for a loan and we want to have a fair market value in-place appraisal and Thaler says to him fine, we will give you a fair market value in-place appraisal. So the jury might find the contract specifically called for fair market value in-place as the type of value which was to be supplied.

THE COURT: And it wasn't supplied then?

MR. BRILL: No. They may find that that was one of the values which was supplied, yes. But they may also find that by failing to define the values which were supplied, by failing to tell Mr. Klein that this appraisal would have no use to him for the purpose which he stated to Mr. Thaler in fact going beyond that, that by making affirmative statements in the appraisal report as to the demand, the scarcity and the value of this machinery, that by that negligence the plaintiff was misled and relied on the appraisal despite the

jq/lf 757 fact that perhaps under a narrow sense the defendant might 3 have supplied --THE COURT: Doesn't that relate to misrepresentation? 5 MR. BRILL: Yes, and it also relates to negligence. 6 THE COURT: It rides on two horses. 7 MR. BRILL: Both causes of action, that is right, 8 your Honor. 9 THE COURT: That is what you say. 10 MR. BRILL: That is what I am saying. 11 THE COURT: I understand your point about the 12 negligence. Go ahead. 13 MR. ERILL: If defendant -- let me put it this way, 14 I think this may be an easier way to put it. If defendant 15 had sent back an in-place appraisal saying here it is, 16 an in-place appraisal, this is only good for the value of 17 this plant as an operating plant, it doesn't give you liquida-18 tion value, we are not going to make any representation as 19 to what the minimal conceivable use of what the equipment 20 might be over the next two years, we are not going to make 21 any representations as to what people might pay for this 22 machinery as used equipment because all you are getting is 23 the equipment in-place as an operating, going concern --24 THE COURT: What do you claim was the contract as 25 to the appraisal? A-1739

1 jq/lf 758 2 MR. BRILL: The fundamental contract was 3 .simple. 4 THE COURT: State what it was. 5 MR. BRILL: The contract was Industrial Plants 6 Corporation was retained to do an appraisal of the machinery 7 and equipment in the Time & Micro plant to determine whether 8 or not that equipment would be adequate as security for a loan guaranteed or made by Ajax in the amount of some \$250,000. 10 THE COURT: That is what you say the contract was? 11 MR. BRILL: Yes. That is the basic contract, your 12 Honor. 13 THE COURT: Go on to the next point. 14 MR. BRILL: So what is the negligence in the record? 15 I think it is really contained in the testimony of Mr. 16 Thaler. If you believe Mr. Thaler, it's not argument over 17 what he did, it's an argument over whether he could rely 18 on Ajax. He testified that all he did really was copy 19 values from the Hirschmann report. 20 THE COURT: I think you are mistaken there, counselor. 21 MR. BRILL: All he did was look at the machinery, 22 this is in his deposition, he looked at the machinery, he 23 compared the machinery to the list on the Hirschmann report, 24 he looked at it to see whether it was in good condition and 25 if so he increased the value on the Hirschmann report or made

1 jq/lf 767 point. But when it's not of his own knowledge he has to 3 state what it's based on. THE COURT: He has to state the source of his 4 5 knowledge, all the source? 6 MR. BRILL: The source of the information which is 7 not part of his expertise as a professional appraiser, your Honor. 9 THE COURT: That is in this standards of the organiza-10 tion. 11 MR. BRILL: Yes, and in Mr. Sinclair's testimony. 12 THE COURT: I don't think that is determinative. 13 Go ahead. 14 MR. BRILL: And the other elements of fraud, your 15 Honor, that the defendant intended to induce the plaintiff 16 to act on its representations by Mr. Thaler's own testimony . 17 once again and that the plaintiff relied on these representations 18 and we have already talked about reliance. As we briefed to 19 this Court several weeks ago this intent need not be a fraudulent 20 intent, an evil intent, it can be an inferential intent 21 based on representations made as to the truth of certain 22 statements. 23 THE COURT: What do you mean by inferential intent? 24 MR. BRILL: An intent that may be inferred from the 25 making of statements without sufficient reason to believe A-1741

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

jq/lf

in the truth of those statements.

THE COURT: You say it's shown?

MR. BRILL: We have shown that Mr. Thaler had no sufficient reason to believe in the truth of those statements which he made in his appraisal report.

THE COURT: All right. What is next?

MR. BRILL: Remember, the claim here is that he was told he could rely on the Hirschmann report and Mr. Haakenson. Mr. Klein testified very specifically he told Thaler not to rely on the Hirschmann report and not to rely on Mr. Haakenson. So that is a direct clash of credibility for the jury, your Honor.

THE COURT: That may be.

MR. BRILL: The last issue I want to address myself to before this rule 15 (b) motion is the question of mitigation of damages, your Honor.

Mr. Stream today has said that this government contract, this \$3,000,000 contract is the only reason that Ajax entered into the loan and security agreement with Time & Micro and so, therefore, a equals c, everything we got from the government when the government terminated this contract is, therefore, applicable to our losses based on their negligence. First of all we will show that this contract --

THE COURT: I don't think he said that.

3

5

6

7

9

10

11

13

14

15

16

17

18

19

21

22 23

24

25

MR. BRILL: Well, I believe I took down his words.

Ajax relied on the government contract and every dollar which Ajax got because the contract was thwarted abates the damages in this case.

THE COURT: That is an entirely different thing than the way you phrased it. But go ahead.

MR. BRILL: Your Honor, the evidence shows that Ajax got a government contract in October, 1966.

THE COURT: How much was it?

MR. BRILL: \$3,000,000. That the expected profits would be -- and this is a matter of common knowledge even if it were not in evidence, it's the first fuse contract, the expected profits over the life of the contract were about \$150,000.

MR. STREAM: That is not so.

MR. BRILL: That is so.

MR. STREAM: The documents in evidence show that Ajax claimed 10 percent on its profits.

MR. BRILL: That is what the documents show but that is not what the evidence is.

MR. STREAM: Ajax filed a false claim and that is why I argue a criminal fraud.

THE COURT: There wasn't any proof of what the profits were or could have been.

1 jq/lf 2 MR. BRILL: Fine, I won't debate that now. 3 THE COURT: Don't then. MR. BRILL: We will let the jury determine --5 THE COURT: Just argue this question. 6 MR. BRILL: In August 1966, there is no government 7 contract, your Honor, there is no signed government contract, 8 there is no proof of any contract about to be signed. 9 THE COURT: It came in October. 10 MR. BRILL: Yes, your Honor, it did. But in August --12 THE COURT: Was it being negotiated? 13 MR. BRILL: Maybe it was being negotiated. THE COURT: Assume it was. 15 MR. BRILL: Ajax is faced with a business decision. 16 Is it going to invest \$270,000 of its own money to have a possibility of Time & Micro as a subcontractor at that point when it doesn't have a government contract? THE COURT: Time & Micro had a very important contribution to make to the fulfillment of this contract. MR. BRILL: Possibly so but Ajax still had to make this decision. Was it worth investing this \$270,000

17

18

19

20

21

22

23

24

25

770

A-1744

on the possibility that sometime later, sometime in October

we might have gotten a \$3,000,000 government contract which

even at ten percent as Mr. Stream says is \$300,000 back to us.

15

16

1',

18

19

20

21

22

23

24

25

In August, your Honor, we wanted to know whether our investment 2 was safe, not if we got the government contract but if we didn't get the government contract. What would have happened 4 5 if we didn't get the government contract in October? That 6 is why Ajax wanted the appraisal. If Ajax got the appraisal clearly Time & Micro would have been a going business once 7 8 again and Time & Micro could have obtained refinancing or could have obtained a turnover of the loan. That wasn't the 10 issue back in August. Until the whole notion that Ajax 11 was relying on the government contract and, therefore, the 12 money which we received at termination of the contract abates 13 our damages in this case is simply absurd and ridiculous, 14 your Honor. It makes no sense.

THE COURT: You have expressed yourself on that.

Anything else? I am going to let Mr. Stream reply.

MR. BRILL: Yes, your Honor, a few minutes on the rule 15 (b) motion. Before trial your Honor ruled that the defendants request to amend the answer at that time would not be allowed and so during this trial there has been no evidence, and I have not been allowed to ask questions nor has Mr. Stream about the reasons for Mr. Klein's payment of the fee or about his understanding of all aspects of the appraisal which he received.

THE COURT: I don't understand your statement. You A-1745

This complaint is based upon a claim that a contract $$A\!\!-\!1746$$

25

1

•

5

7

6

8

9

11

13

12

14

15

16

17

18

19

20

21

23

24

25

was breached in that the plaintiff didn't provide a fair market value appraisal. That is what the complaint says.

THE COURT: Where is that in the pretrial order?

MR. STREAM: All the pretrial order does is raise a series of contentions. The plaintiff's claim that it did not get a fair market value appraisal because fourteen months later at a forced sale at public auction the values weren't there. That is like mixing apples and peaches. They are two different creatures. Here is what troubles me most. It's the fact that the plaintiff is now going to attempt to engraft into that complaint a totally different creation of h's own ingenuity during this trial. He is going to refer to a phone call during which he says that Mr. Klein by his testimony heard from somebody named Kriser that the forced liquidation value was \$500,000 and he is going to try and point out that Mr. Kriser says go ahead with it because -go ahead with the guarantee because the forced liquidation value is \$500,000 when the fact is that those conversations are entirely outside of the issues of this case. This is not a suit for misrepresentations made generally. The misrepresentations alleged in the complaint and in the pretrial order deal with the failure of the defendant to disclose that its fair market value appraisal was not conducted in accordance with certain sequences and chronologies and in

A-1747

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jq/lf

776

1 conformity with certain standards which he says, that is to 2 3 say Mr. Klein says and his witnesses as an expert says, should have been observed. This fraud is a fraud in connection 4 5 is alleged to be in connection with the preparation of the 6 appraisal. It is not a fraud in extraneous statements made 7 by Mr. Kriser to the plaintiff and if he gets up tomorrow 8 and he attempts to claim that he relied upon assurances and 9 that his client relied upon statements I am going to object 10 with all the vehemence at my command. That is not the issue in 11 this case. The issue in this case is did the plaintiff break 12 its - did the defendant break its contract. The second issue 13 is did the defendant commit fraud by representing itself 14 to be experienced when it wasn't. The fraud is not that he 15 got a misrepresentation from somebody after the appraisal 16 was rendered. That is not a proper issue for this Court. 17 That is why I didn't mention it in my motion. It has no 18 part in this case. I repeat, I put counsel on notice that 19 if he makes that as a point I am going to stand up, interrupt 20 his summation and he will hear a ruling from the Court.

21

22

23

24

25

MR. BRILL: I would like to respond to that.

THE COURT: You don't need to respond.

MR. BRILL: I intend to respond now rather than tomorrow morning in front of the jury, your Honor. I am entitled to refer to that.

•

O

THE COURT: You will have to wait at least until he gets through.

MR. BRILL: After he is done, your Honor, yes.

THE COURT: You are not going to interrupt him.

He didn't interrupt you.

MR. BRILL: I don't know about that.

MR. STREAM: I will remark at this Court's patience at the most contumacious conduct which I have ever seen in 35 years at the bench. It's a good thing I am not sitting on the bench. I would know how to handle that kind of interruption both of the Court and of counsel.

I don't think I need to go beyond that. I have made my statement. Counsel made a summation instead of an answer to an argument. He is arguing dribs and drabs and the fringes of facts which don't develop sufficient substantials to meet the narrow issues which the plaintiff created by its own complaint. He stands up here and he has the temerity to argue that his complaint doesn't mean a thing, it's been amended and extended by a pretrial order which does nothing of the sort. All it does is state contentions of evidentiary natures. It does not alter the allegations of his complaint. He said in his complaint that the plaintiff sought a fair market value appraisal and he got it but that the values were wrong because fourteen months later there was a forced sale

19/1f

2 auction and the Time & Micro facilities were sold for peanuts.

That is a total non sequitur.

THE COURT: All right, you may reply --

MR. BRILL: Two short things, your Honor. Number one, if Mr. Stream is now contending some several years after the pretrial order is signed that it doesn't amend the complaint, that our contentions in that pretrial order have nothing to do with this trial I simply move our complaint be amended to comply with the pretrial order as indeed we were acting under through the whole first trial and through this trial. Secondly, one of the issues in this case which Mr. Stream has raised is reliance, whether or not we could rely on their appraisal. If one of their officers tells us go ahead and rely on the appraisal then that is relevant, your Honor. That is relevant to our reliance.

THE COURT: Are you through now, Mr. Brill?

MR. BRILL: That is it, your Honor.

MR. STREAM: Nothing further.

THE COURT: This isn't something easily determined.

I want all the exhibits, please, now from both sides.

You gaze at me as if I am asking for something like a free trip to the moon.

MR. STREAM: You have the defendant's exhibits.

MR. BRILL: I have a motion of my own.

7 8

THE COURT: What motion do you have? State it now if you have something at this point. Your case has ended. You can't make any particular motion unless it's a motion for a directed judgment and that is most unlikely.

MR. BRILL: I will reserve my motion until the close of defendant's case, your Honor.

THE COURT: That is proper.

MR. BRILL: I gave those exhibits to you without checking through them, your Honor.

THE COURT: Check through them to see if they are here.

MR. BRILL: May we have a ruling on the special verdict, your Honor, before the summation?

THE COURT: I am not going to be forced to do that until I pass on these motions. Why should I? I will give it to you before you start your summations.

MR. STREAM: Have a good evening, your Honor.

THE COURT: Thank you, sir.

(Trial adjourned to October 21, 1975, at 10:00 a.m.)

jq/1f

2 | AJAX HARDWARE MFRG. CORP.

Vs.

69 Civ. 1900

INDUSTRIAL PLANTS CORP.

22.

October 21, 1975 9:45 a.m.

(In open court - jury not present)

THE COURT: Good morning, gentlemen. After some considerable deliberation and some study I have come to the following conclusions with respect to the motions made by the defendant yesterday.

The first in substance is the motion to dismiss upon the ground that the plaintiff has failed to produce sufficient evidence to support the complaint. The complaint itself -- and if you don't hear me at any time please speak up -- the complaint itself filed on May 5, 1969, in paragraph 4 (a) alleges that on or about August 12, 1966, "In contemplation of a prospective loan and security agreement with Time & Micro Instruments, Inc., of Strasburg, Pennsylvania, hereinafter termed Time & Micro, the plaintiff entered into a contract in New York with defendant whereby defendant agreed to appraise the machinery, equipment of Time & Micro and to advise and report to plaintiff the true value thereof."

The parties stipulated that certain facts listed in the pretrial order and in an appendix thereto were not in

1 jq/lf 781 dispute. These stipulations so agreed upon including items 2 in respect to the following: one, organization of the 3 corporate planning for the corporate defendant. Two, that the matter exclusive of interest and cost exceeded the sum 5 6 of \$10,000. 7 Three, that the defendant held itself out to 8 plaintiff and the public that it was a firm which was in the 9 business of, an expert in the appraisal and auction sale 10 of industrial machinery and equipment and related merchandise. 11 Four, that Jesse Thaler was an officer of the 12 defendant who made industrial machinery appraisals in 13 behalf of defendant and was a member of the American Society 14 of Appraisers. 15 Five, that the plant of Time & Micro was located 16 at Strasburg, Pennsylvania. 17 Six, on or about August, 1966, the defendant 18 telegraphed to plaintiff its preliminary report, that is that 19 a program or that a telegram was not received but sent 20 on said date. 21 Seven, that on or about August 19th defendant mailed 22 to plaintiff a detailed appraisal report. 23 Eight, that on or about November 10, 1966, the 24 plaintiff paid to the defendant the sum of 4,422.71 for 25 defendant's fees, see I believe Exhibit E.

Nine, that on or about August 10, '67, an auction of various pieces of machinery and equipment of Time & Micro were held, that this auction was publicated and advertised by defendant, that the proceeds thereof on that date were \$114,278. In opposing the motion by defendant the plaintiff contended that, "By the pretrial order the pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of the pretrial order," from which I have read you.

The Court has carefully considered this motion of the defendant and is forced to the conclusion that it must consider not only the complaint itself which may be somewhat sparse but the pretrial order as hereinbefore quoted. Accordingly, the motion of the defendant with respect to the sufficiency of the proof based upon certain allegations with respect to breach of contract, negligence and fraud is denied.

Secondly, a motion has been made with respect to breach of contract. I have seriously considered this motion and it is my belief that the complaint is in effect amended by the pretrial order and is consequently, in my judgment, sufficient. I further believe that it cannot be said that plaintiff has failed to produce any proof with respect to the alleged breach of contract and, therefore, this issue must be submitted to the jury and the motion is denied.

1

3

5

6 7

10

9

11

12 13

14

15

16

17

18

19

20

21

22

23

25

Now as to negligence, the question of negligence, in my humble opinion, is completely merged in the alleged breach of the contract. If there is a contract to do a certain thing and the contract has been fulfilled negligence is immaterial. On the other hand, if the appraisal has been so negligently performed that it does not meet the requirements of the basic agreements then the contract has been breached. The complaint insofar as it alleges negligence separately is dismissed since negligence is entirely incorporated in the question of the fulfillment of the contract itself.

Now I come to fraud. The defendant has moved to dismiss this claim or count of fraud. The elements necessary in order to prove fraud are as follows:

One, that the defendant made a representation of a material fact to the plaintiff. Second, that the said representation of a material fact was false and was known to be false by the defendant or was made by defendant recklessly without knowledge as to its truth or falsity or without any reasonable basis to believe in its truth. Three, that the defendant thereby intended to deceive plaintiff. Four, that the plaintiff believed and justifiably relied on said representation and was reduced by it to guarantee a loan to Time & Micro or by Time & Micro. Five, that as a result of the reliance of plaintiff upon said representation of defendant plaintiff suffered pecuniary loss.

must be and is dismissed.

To permit the charge of fraud to go to the jury in

this case, I conclude that the plaintiff must have proved each and all of the aforesaid evidence by clear and convincing evidence. The standard of proof is different than the ordinary civil action. It is not the same necessarily as a criminal action but it is greater than the ordinary civil action. The Court is of the opinion that this has not been done, that standard has not been achieved and, therefore, this cause of action, that is the cause of action for fraud

This motion relates to the motion of the defendant to conform its answer to the proof, particularly with respect to the defense of waiver. As part of the pretrial conference held by this Court on or about October 14, 1975, the Court denied the application of defendant to amend its answer to raise this defense of waiver. Here the defense raised was that the plaintiff by paying for the appraisal has waived any defect in the appraisal. Rule 15 (b) of the Federal Rules of Civil Procedure provides in pertinent part as follows: when issues not raised by the pleadings are tried by express or limited consent of the parties, that is throughout the trial, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the

jq/lf 785

pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, that is where there has been a consent to the evidence which has been inserted with respect to this, in this instance, waiver. Under this rule the issues which are to be waived by the amendments and the pleadings must be deemed to require expressed or implied consent of the opposing party. Here there was no consent to trial of this issue by the plaintiff nor in respect to any questions or testimony in reference to the same elicited by the plaintiff during the plaintiff's case or by, in fact, the defendant.

Consequently, this motion must be denied.

Mr. Stream, are you going to put some proof in?

MR. STREAM: Your Honor, depending upon the outcome of the motion that I am now going to make --

THE COURT: You got another motion?

MR. STREAM: Yes, on the basis of the decision of this Court I have a motion which briefly stated is in the nature of a motion to arrest counsel from certain references in summation. In view of the fact, your Honor, that this lawsuit will go to the jury on a composite question of breach of contract --

THE COURT: I shall later, not at this moment, but

A-1757

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

a

jq/lf 790 on the appraisal, because if they tell us to rely on the 2 3 appraisal isn't that relevant to our reliance? MR. STREAM: Let me answer that in a much lower 5 decibel than counsel seems to be using. 6 THE COURT: That will be helpful. 7 MR. STREAM: The issue of reliance, your Honor, is 8 an issue which will be elicited in my summation from the 9 plaintiff's course of conduct. What I objected to here was 10 the reference to assurances on the part of the defendant. 11 THE COURT: Will you please sit down. I hate 12 to have to do this but you interrupt Mr. Stream repeatedly. 13 MR. BRILL: I did not say a word. The record 14 reflects that. 15 THE COURT: You stood up as if you were going to 16 talk. Be seated until he gets through. 17 MR. STREAM: What I objected to was references 18 by counsel in summation to statements by officials of a 19 defendant which were really of the character of assurances 20 or representations and that is what this Court has ruled 21 upon. 22 THE COURT: That is my order, too. 23 MR. BRILL: I respectfully move at this time 24 further for reargument of your ruling on these motions with 25 respect to the separation of the negligence cause of action. A-1758

THE COURT: That is denied. You had ample opportunity yesterday and I am not going to open it up now. I have denied your motion.

What about the third point?

MR. BRILL: There was no third point.

THE COURT: There are two points. I have decided what you should do or not do.

Mr. Stream, are you going to enter some proof?

MR. STREAM: May I have a minute, your Honor? I don't believe in light of the results that I am going to put anything in.

THE COURT: Decide that.

Will you be seated, please, you aren't addressing the Court. I hate to treat this like a Sunday School or nursery school but sometimes I have to.

MR. STREAM: Your Honor, I have elected with the Court's permission to limit the defendant's case to the statement before the jury of several of the admitted facts.

THE COURT: Are you presenting any evidence?

MR. STREAM: No testimonial evidence.

MR. BRILL: These admitted facts are not before the jury until they are introduced into evidence.

MR. STREAM: That is pre:isely my position. I am going to put them before the jury.

A-1759

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COURT: It must be by proof.

MR. BRILL: Not by reading before summation.

THE COURT: I don't want any more of this nonsense,

Mr. Brill. Obviously any attorney in the summation may

comment on what has been stated by witnesses. I don't know

why you sound off on that score.

MR. PRILL: I am not sounding off on that score.

THE COURT: I am glad to have your admission.

What else is there? Anymotion made by the plaintiff?

MR. BRILL: I do have motions, your Honor.

THE COURT: State what they are. You may proceed.

MR. BRILL: At this point I move for a directed verdict on the breach of contract cause of action.

THE COURT: Denied.

MR. BRILL: Now I move most seriously --

THE COURT: I assume all motions are seriously.

MR. BRILL: This one more seriously than any motion I could possibly make, at this point that your Honor strike the defense of mitigation of damages and strike from the record the three exhibits, B, G and I which the defendant has introduced subject to your Honor's ruling on October 15th.

THE COURT: State your reasons.

MR. BRILL: That those documents and that evidence were admitted only subject, and I quote your Honor's ruling,

subject to a later connection being made by the defendant with respect to payment as may show a valid claim of Ajax against Time & Micro arising out of the payment by the government to Ajax on behalf of Time & Micro. Your Honor, the only evidence which defendant has submitted, the only evidence, does not show any such payment to Ajax on behalf of Time & Micro. The evidence is three documents, your Honor, only three documents. The first one which I believe is Defendant's Exhibit B is a termination proposal or settlement proposal or claim made by Ajax on or about May 7, 1967, submitting a claim of approximately \$399,000 to the U.S. Government for termination of this fuse contract. That is Exhibit B.

THE COURT: What about G?

MR. BRILL: I am talking about B.

No claim on behalf of Time & Micro was contained in that document, your Honor.

Now Exhibit G is a settlement proposal submitted on or about December 9, 1968, on behalf of Time & Micro for some \$65,000, just a claim, your Honor. Finally, the only other document, the only other proof submitted by defendant on this issue, Exhibit I, is a final settlement proposal reflecting a total payment of Ajax of some \$250,000. Nowhere in any of the documents which defendant has submitted, and defendant has had ample opportunity to pick and choose what it

Jq/lf 794

wanted to submit and the proof which it wanted to submit, is there any proof in this record, in this trial that Ajax received anything on behalf of Time & Micro's claims and it is defendant's burden of proof on its affirmative defense to show that subject specifically to your Honor's ruling that these payments be connected up in some specific way to receipt of Ajax by monies on behalf of Time & Micro.

THE COURT: Have you finished your argument on this motion? I don't want any return. Have you finished your argument?

MR. BRILL: Just one moment.

THE COURT: Finish up. I am not going to open it up again after a decision is made.

MR. BRILL: Furthermore, not only is there no showing that anything was received on behalf of Time & Micro but in support of this specific defense of mitigation of damages, not failure of mitigation, there is no proof that Ajax kept any of the money, even if there were proof that it received money in behalf of Time & Micro.

THE COURT: I think the contention is that they should have kept some money.

MR. BRILL: The contention originally was that we received sums of money on behalf of Time & Micro and we should have kept some of that money. That was your Honor's ruling

jq/lf 795 as I read it to you on October 15th. But as I said the proof fails to establish that. THE COURT: Finish up your argument fully and 5 completely and stop. 6 MR. BRILL: At this time I move that the issue 7 of mitigation be eliminated from the jury's consideration in 8 this lawsuit. 9 THE COURT: As a defense? 10 MR. BRILL: As a defense and further that the 11 defendant be instructed to refrain from any comments to 12 these payments or to these exhibits in its summation to the 13 jury. 14 THE COURT: I am sure that if it's eliminated he 15 won't refer to it. 16 Any opposition? 17 MR. STREAM: Yes, your Honor. To begin with, 18 counsel errs when he assumes that the defendant's case is in. 19 The defendant's case hasn't started yet. 20 MR. BRILL: I thought the defendant's case was in. 21 That is why I made the motion. 22 MR. STREAM: The defendant's case is not in until 23 I offer as proof certain admissions of fact which are stipulated to be admissions of fact. 25 THE COURT: In other words, you are not resting.

3

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. STREAM: I am not resting, your Honor.

THE COURT: You may put in whatever is appropriate proof.

MR. STREAM: I will accept the challenge of the motion anyhow. Counsel is also in error when he expresses the view that it is a defendant's burden to prove mitigation of damages. It is not. The cases with which this Court is well familiar indicate that it is an element of the plaintiff's case and it is the unremitting burden of the plaintiff to prove each and every element of its case including financial loss, which is damage. So we don't have the burden of doing anything except raising the issue.

Insofar as these three exhibits are concerned and our entire defense is concerned, our position, as I have stated on three occasions, is that Ajax in entering into this guarantee transaction, your Honor, relied not upon the appraisal of Industrial Plants but relied upon the forthcoming \$3,000,000 government contract. I will argue that to the jury at the right time. I submit to this Court that if the Industrial Plants appraisal had come back with blank sheets Ajax would have gone ahead with this guarantee in order to protect its \$3,000,000 contract. In light of that, your Honor, I mean to point out that Ajax having entered into a guarantee to help make Time & Micro ready for this government

*

contract, I say, they worked out this loan to provide Time & Micro with start-up funds. Less than 60 days after that contract was secured it was terminated by the government. I might add that Time & Micro wasn't even engaged as a subcontractor until December 11, 1966, less than two weeks before contract termination.

In light of the fact that counsel and the witnesses all conceded that you can't have subcontracts until you have a prime contract, we take the position that we can argue to this jury, and we propose to argue to this jury, that when Ajax put a claim in for close to \$400,000 claiming damages in contract termination and turned around and got back from the government \$259,000 -- \$149,917, it not only recovered the amount of its guarantee, it also fleeced the government for a considerable sum of money. That is an issue which belongs before this jury, not as to the fleecing but as to the fact that the plaintiff fully recovered its financial loss and that is the reason that defense was asserted and that is the reason those exhibits are in.

THE COURT: Do you want to reply to all of that briefly?

MR. BRILL: Yes, your Honor. I take extreme exception to any remarks which Mr. Stream might make as to fleecing the government or ripping off the government.

THE COURT: Argue the motion. I am not ruling on his remarks.

MR. BRILL: If any such remarks are made during summation your Honor immediately should instruct the jury not to pay attention to them.

not your motion is granted. If the motion is denied naturally he is allowed to speak as to what may sustain his contention. That is basic and that you should have learned in law school, if I may say so. I am not criticizing you. You have done very well in this case, which I understand is the first jury case you have ever tried.

MR. BRILL: Thank you, your Honor. It has been difficult at times, I do confess.

THE COURT: It always is when you start in.

MR. BRILL: Your Honor, I made this motion under the understanding that Mr. Stream had put in his case.

THE COURT: You may make it again after whatever proof there is.

MR. BRILL: I would reserve this reply.

MR. STREAM: I don't want any delays.

Your Honor, I tell you right now and I tell counsel right now, and I might as well say it now because we are going to have much flak if I say it later on and some more

1 | jq/lf

admissible.

MR. BRILL: May I respond, your Honor?

THE COURT: Not yet. Let me read them, please.

First, do you contend that none of these admissions may be stated to the jury?

MR. BRILL: Yes, your Honor.

THE COURT: What kind of doctrine is that?

MR. BRILL: On the grounds of relevance, your Honor.

The facts are admitted to be true but not to be relevant

to this lawsuit.

THE COURT: Does it say that anywhere?

MR. BRILL: This was a reservation made, the reservation is within the rules.

THE COURT: Where is it stated?

MR. STREAM: Counsel expressed that view before we amended our answer to include the defense of mitigation. Nothing can be more relevant to a defense of mitigation than to show the very payments which lie at the root of that defense. And those payments, your Honor, total \$249,917. Counsel is protected by the language in the first admission, I think it was number 13, which says that the plaintiff received that money not only for itself but for all of its subcontractors. So no one is flimflamming this jury.

MR. ERILL: That is exactly what is going on if I may

1 19/1f 801 2 reply. 3 THE COURT: You don't need to make any such insult-4 ing remark to Mr. Stream. This is a lawsuit, not a duel. 5 MR. BRILL: It is an attempt to confuse this jury. 6 THE COURT: It's an attempt to state the position 7 of the defendant and that is always relevant and the Court 8 must listen and I don't expect to have any side remarks 9 such as you just made. 10 Argue the law of this thing and the facts, what-11 ever. 12 MR. BRILL: The admissions which Mr. Stream has 13 stated that he intends to read to the jury concern as we 14 have discussed before a total of some \$250,000 which Ajax 15 did receive from the United States Government arising out of 16 claims and losses --17 THE COURT: You consider that it was on behalf of 18 itself and its subjects? 19 MR. BRILL: That is correct. 20 THE COURT: That is what this says. 21 MR. BRILL: Mr. Stream has now stated he will 22 offer proof under paragraph 21 of these requests for 23 admissions that \$20,000, \$20,000 only, of this amount --THE COURT: What is that statement? 25 MR. BRILL: Paragraph 21, your Honor.

3

1

5

6

7

8

9

10 11

12

13

14

15

16

17

18

19

20 21

22

23

24

25

THE COURT: I don't understand your point at all.

MR. Under paragraph 21 that only \$20,000 --

THE COULT: All right, only \$20,000 If that is to be taken in diminution that is 20,000 bucks.

MR. BRILL: What are we talking about, 20,000 or 250,000?

THE COURT: That depends upon what may be concluded from these admissions, I suppose.

MR. BRILL: But when these documents were admitted they were admitted subject to connection of a showing of valid claim by Ajax against Time & Micro arising out of any of these payments. The only such claim that could possibly be shown, your Honor, relates to that \$20,000, not to the whole amount which was received by Ajax on behalf of its own losses or on behalf of somebody else's losses. What does that have to do with Time & Micro? We can't take the money we got for subcontractor A somewhere else in the country and take that money and apply it to a loss by which we should have taken money from Time & Micro.

THE COURT: So it should be limited to 20,000? MR. BRILL: At the most. That is our firm position on this.

> THE COURT: Are you through now, counsel? MR. BRILL: In reply to this. I have further A-1769

motions, yes.

THE COURT: I mean on this motion. We will take one motion at a time if it takes all day. I am not going to mix up motions.

MR. BRILL: I have one more thing on this motion then, your Honor. That is that there is, as I said, no proof that Ajax kept this money on behalf of Time & Micro. I insist that that is a part of Mr. Stream's case. This is evidence that could have been available to Mr. Stream and he sought no such evidence.

THE COURT: They got the 20,000, didn't they? Is there any question about that?

MR. BRILL: There is no such question.

THE COURT: You concede that.

MR. STREAM: I don't want that concession.

Let me tell you what happened here. As I pointed out before, we don't have the burden of doing anything but requiring the plaintiff to show that he has had a financial loss.

This man insists upon attempting to limit mitigation to \$20,000. That is not the defendant's case. What we say is that the plaintiff admits that it received \$249,000 plus.

Now the plaintiff says we didn't keep that money, that is what the plaintiff says, and counsel can argue that to the jury. We say that the plaintiff did. We don't say that

only \$20,000 is to be mitigated. As a matter of fact, we don't know whether Ajax ever paid that twenty to Time & Micro. I will bet my bottom dollar they never did. That is a matter of proof, nothing more or less. It doesn't go to the admissibility of the evidence. We have a right to put before this jury the fact that the plaintiff received \$249,000. Let the jury argue or let the jury hear arguments from both counsel as to the relevance of that fact. It's a fact which certainly is relevant to the issues but whether or not its mitigation will be up to the jury to decide. We have no burden at all, your nor, to show that Ajax kept that. We have put that money into Ajax's hands. It's Ajax's burden to show that it did something with it. That is why that defense of mitigation is most important and why it was allowed.

THE COURT: Do you want to say anything more?

MR. BRILL: Yes, I do. It's not a question for the jury to determine the relevance. It's a question for the Court to determine the relevance and only if it's relevant for the jury to determine the facts.

THE COURT: Why isn't it relevant?

MR. BRILL: It's not relevant because --

THE COURT: I am going to pose a distinct question

to you.

1

3

4

5

6

7 8

9

10

11

12

13

14

15

16

17

18

19 20

21

22

23

24

25

MR. BRILL: Thank you, your Honor.

THE COURT: Is it the plaintiff's obligation to prove mitigation? Mr. Stream says the plaintiff must prove damages. There is no question about that.

MR. BRILL: I am not sure I understand the question. Do you mean is it the defendant's obligation or is it the plaintiff's obligation?

MR. STREAM: The Court said the defendant's obligation.

MR. BRILL: To prove mitigation?

THE COURT: Yes.

MR. BRILL: Yes, it is.

MR. STREAM: No way. This Court has law that says not only is it the defendant's burden, it doesn't have to be pleaded as a defense. That is how much it is a part of the plaintiff's case to show damage.

THE COURT: Generally that is right. However, I am not certain about what the duty of the defendant may be and I am going to reserve a little on that if possible.

Anything else you want to say?

MR. BRILL: One further very important point, your Honor. Mr. Stream has stated now that because the loan and security agreement was entered into because of the fuse contract and because the \$249,000 was received because

10

11

12

13

losses arising out of the fuse contract ipso facto A equals B and, therefore, that \$249,000 has to be considered by this jury in connection with losses caused by the defendant's breach of contract. Your Honor, if there was no breach of contract, Ajax would not have lost the \$160,000 on the guarantee to Time & Micro --

THE COURT: That is taking a sidetrack and I don't know about these algebraic expressions.

MR. BRILL: There is no claim to the government for the loan guarantee loss. None of that money reimbursed us directly or indirectly for the loan guarantee loss and if it's \$20,000 that we received --

THE COURT: I have your point. Is there any other motion which you wanted to make?

MR. BRILL: Yes, there is a further motion, your Honor. I move the Court to fix the compensatory damages in this case.

THE COURT: To do what?

MR. BRILL: To fix the compensatory damages.

THE COURT: That is the jury's job. Why do you say the Court should make it?

MR. BRILL: I make a two-part motion, your Honor.

Number one, if your Honor grants my motion with respect

to mitigation the evidence with respect to damages in this

A-1773

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

) 14

15

17.

18

19

20

21

22

23

24

25

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

MR. BRILL: It's not simply a question of his admission, it's a question of what possible conclusions can be drawn from the evidence which is in the record at this trial.

THE COURT: That is something you have to argue to this jury.

MR. BRILL: They have no discretion to award damages other than \$161,895.

THE COURT: I am not so certain about that.

MR. BRILL: Does your Honor expect to charge them that they have total discretion with respect to damages?

THE COURT: I am not going to state my charge at this moment and your motion, whatever it is, must be denied, this second motion.

Any other motions? Have you got a third one?

MR. BRILL: Yes, I do.

THE COURT: Go ahead. Let's get these out of your system.

MR. BRILL: It's not something to get out of my system and I seriously object to the tone of this Court that I am making frivolous motions or trying to get things out of my system.

THE COURT: I didn't say you are giving frivolous motions. Just state your motions.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

19

20

21

22

23

24

25

I am doing that at the present time. The defendant made a motion this morning to strike out any reference to a telephone conversation between Mr. Kriser and Mr. Klein 5 on August 30, 1966. In addition defendant stated that he did 6 not want any statements made by Kriser to Klein. (Which imputed that Klein could go ahead with his guarantee of the loan in reliance on defendant's appraisal brought to the 9 attention of the jury in plaintiff's summation.) The Court 10 granted this motion. In reconsidering my ruling, and I 11 have reconsidered it extensively, I now feel that this con-12 versation and possible inferences which could be drawn there-13 from are relevant at least to the plaintiff's claim of breach 14 of contract, specifically the question of damages arising 15 under the breach since at that time that these statements were 16 allegedly made plaintiff could have withdrawn from his loan 17 guarantee arrangement. I, therefore, revise my determination 18 and deny that motion of the defendant.

Now I come to this portion relative to the mitigation problem. The motion by plaintiff, and I have considered this extensively, the motion made by plaintiff to dismiss the defense of mitigation is granted except to the extent that defendant has introduced evidence showing payment by the government to the plaintiff of \$20,000 on behalf of Time & Micro. Plaintiff's motion with respect to Defendant's

815 1 jq/lf Exhibits B, G and I is denied. I think you all know what B is and what G is and what I is. We have also in chambers 3 just a moment ago passed upon and have an agreement with respect to the wish of one juror to take notes. 5 We will have to make arrangements right after the 6 jurors get back, that was at 1:30, at that time to have 7 8 ready whatever you wish to submit. 9 MR. STREAM: I made it clear to the Court that when I said that I would dispense with Mr. Kriser's testimony 10 I did it because the Court had told me that the motion in 11 bar or in arrest had been granted so that no references 13 could be made to this conversation. 14 THE COURT: If you want to call Kriser. i MR. STREAM: I have to call him. 16 THE COURT: All right, get him here. What time 17 can you get him, two o'clock? 18 R. STREAM: I will get him here at 1:30. I will 19 work it real short. 20 THE COURT: I will allow it. 21 MR. STREAM: Did I understand the Court to say 22 that the motion to strike Defendant's Exhibits B, G and I 23 were denied? 24 THE COURT: That is correct. 25 Get Kriser here at 1:30, if you can. I have indicated

A-1779

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

that I would be generous with the time on both sides as to the argument. It's more important to have completeness than to have brevity. Brevity is a fine thing if it

> MR. STREAM: Can we go off the record, your Honor? THE COURT: Yes.

815a

(Discussion off the record)

(Luncheon Recess)

Agax vs. 1 jq/lf Industrial Plants Jurge Levet 2 69 jv. 1900 10/21/75 3

AFTERNOON SESSION

1:30 p.m.

(In open court - jury not present)

THE COURT: Mr. Stream, I assume you are going ahead with the claim for the 20,000. I shall make my ruling about the stipulations. I hereby rule that number 21 may come in and to explain 21 there also must be number 13, which may go in.

MR. STREAM: Thank you, your Honor.

THE COURT: Now, do you want to take that up with the jury first before the witness or after the witness?

MR. STREAM: After the witness testifies.

THE COURT: We will proceed then with the witness. You may get the jurors in.

(In open court - jury present)

THE COURT: Mr. Foreman, and members of the jury, as you know, the plaintiff has completed its case. However, the defendant has, I think, at least one witness whom he will call at the present time, I believe.

MR. STREAM: Thank you, your Honor. Mr.Sidney Kriser, please.

SIDNEY KRISER, called as a witness on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

A-1781

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE. NEW YORK, N.Y. - 791-1020

5

8

7

10

11

12

14

15

16

17

18

19

20

21

22 23

24

25

1	jq/lf	Kriser-Direct	817
2	DIRECT	EXAMINATION	
3	BY MR.	STREAM:	
4	Q	What is your business?	
5	A	I am an industrial auctioneer and an appraiser	rof
6	industr	rial assets.	
7	٥	What company are you connected with?	
8	A	Industrial Plants Corporation.	
9	Q	How long?	
10	A	I have been associated with Industria Plants	
11	Corpora	tion for approximately 40 years.	
12	Q	What office do you hold?	
13	А	I am now the president of the corporation.	
14	વ	What office did you hold in 1066?	
15	А	I was secretary-treasurer.	
16	Q	And in 1967?	
17	А	The same office.	
18	Q	Was Jesse Thaler associated with your company i	Ln
19	1966?		
20	Α	He was.	
21 22	Q	In what capacity?	
23	А	He was a vice president.	
	Q	Was he there in 1967?	-
24	А	He was.	
25	Q	How long had he been with Industrial Plants by :	1966?
		A-1782	
		SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y 791-1020	

FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

3

4

5

6

7 8

9

10

11

12

13 14

15

16

17

18

19

20

21

22

23

24

25

A I would say that his term of office and association was at least 5 years.

Q What was his role in the company, sir?

A Jesse took care of 90 percent of all the industrial appraisals that were done by Industrial Plants Corporation.

Q Can you tell us, please, Mr. Kriser, you said the business of Industrial Plants was industrial appraisals, is that the term you used?

A Right.

Q Does it have another function or does it perform another business?

A We are industrial auctioneers as well and also we are liquidators of industrial assets.

Q Were you in this courtroom, Mr. Kriser, during the time when Mr. Howard Klein testified in this case?

A Yes.

Q May I direct your attention, sir, to August 30, 1966. Can you tell us whether or not you had a conversation with Mr. Howard Klein on that day?

A I did.

Q Where were you during that telephone conversation?

A I was in my office in New York City.

Q Where was Mr. Klein?

THE COURT: If you know.

4

5

6

7 8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

are requesting you to make in connection with that appraisal?" and I said, "I read your proposed letter requesting a \$500,000 guarantee."

Q Would you be good enough to stop there for a second, please.

Please examine Plaintiff's Exhibit 8 which was received in evidence and is a letter written by Mr. Klein to Jesse Thaler on August 29, 1966, to which is appended a document called a rough draft of a purchase agreement, and after you have looked at it I will ask you a question.

A Yes, sir.

Q Is that exhibit that letter, the one to mich you just referred --

THE COURT: What is the number?

MR. STREAM: That is Plaintiff's Exhibit 8 in evidence.

Is Plaintiff's Exhibit 8 in evidence the letter or the proposal to which you just referred in your testimony?

THE WITNESS: It is.

Q Would you be good enough to continue to relate what you said to Mr. Klein and what he said to you during that conversation on August 30, 1966?

A Well, I told Mr. Klein that I took very definite exception to the presentation of this letter and I explained

to him just why.

3

5

6

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Yes.

Q Now would you be good enough to tell us whether

Q You tell us what you said to him and what he said to you.

A I said to him that this proposal that he had submitted to us could never have been developed under Mr. Thaler's authority because Mr. Thaler had no jurisdiction or authority to make any financial commitments concerning the business affairs of the Industrial Plants Corporation. He was merely our professional appraiser.

- Q What did Mr. Klein say to that, if you recall?
- I do not recall.
- e e Continue.

A I went on to tell Mr. Klein that in my good judgment he had either misread or misinterpreted anything that Mr. Thaler might have told him because he could not make this kind of a commitment.

THE COURT: Let me see the exhibit.

Have you now as completely as you can recall the day recounted that aspect of the conversation you had with Mr. Klein?

As far as this letter commitment is concerned?

0 Yes.

A-1787

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

A-1788

8 reads, and this is a rough draft addressed or attached

24

25

Plaintiff's Exhibit 8, the attachment to Plaintiff's Exhibit

to Mr. Klein's letter to Mr. Thaler and it's meant to be signed by Industrial Plants to Ajax. "We further agree to give you a standby commitment for a period of five years, that we will guarantee to liquidate for you within a period of six months from notification the machinery and equipment in your Time & Micro instruments plant or warehouse for a guaranteed amount of at least \$500,000."

THE COURT: That paper is attached to the letter?

MR. STREAM: Yes, sir, which is Plaintiff's 8 in evidence.

Q Having asked Mr. Klein why he wanted that overriding figure, what, if anything, did he say back to you?

Well, he said that they wanted to be covered for the extent of this loan that they were going to make to Time & Micro. I answered him by saying, "Mr. Klein, a guarantee that you are asking for is a very, very vital piece of business as far as Industrial Plants is concerned because what you are asking us to do is to at any time you put this machinery to us, if we agree to a guarantee, we have got to be prepared to buy it. Obviously, we would never leave a guarantee outstanding for five years." So I said, "In essence the thing that you are asking us to do is completely impossible." I then asked him if -

Q Let me interrupt you by asking you what did Mr.

1

3

4

5

6

7

8

9

10

11

12

13

15

14

16

17

18

19

20

21

22

23 24

25

Klein say in response to that statement that you just made?

A I don't recall that there was a response but I do remember at that point he wanted to know -

THE COURT: He said.

He said or he asked whether we were prepared to make a guarantee.

Q What did you say?

I said, "Well, if there was a good business reason for us to make a guarantee we would," but nowhere near the kind of money he was talking about.

Q Did you get to a point where you did discuss the revised deal?

Yes. He said to me, "I can't understand why not at those numbers I am talking about, Mr. Thaler indicated that at no time would the machinery that he appraised be worth less than 60 percent of the appraisal." He said, "That would be \$600,000." I said, "Mr. Klein, what Mr. Tha er appraised, which was a fair market value appraisal of the Time & Micro machinery in-place, has nothing to do with what you are now asking me to do which is to now give you a commitment to buy that machinery. One has nothing to do with the other. One is white and the other is black. An appraisal has nothing to do with a guarantee and you can't talk about them in the same context because there is no re-

Q Did you tell him why?

A Did I what, sir?

Q Did you tell him the reason you had to charge him a fee?

MR. BRILL: Objection to the leading, your Honor.

THE COURT: I don't think it's leading. Overruled.

Not every leading question is sinful.

A I told him that if we were going to give him a guarantee of \$350,000 which we would hold firm for 120 days, which meant that if he accepted it he could have at any time put that machinery and equipment to us for our purchase for \$350,000 and we would have had to pay him a check for that amount for that service. He was going to pay us a five percent fee.

THE COURT: That is what you said?

THE WITNESS: That is what I said to him. He said to me, "That is high for 120 days."

I said, "Mr. Klein, we are going to have to debit our net worth during the course of 120 days to give you this put of \$350,000. Besides that, if we have to buy that machi ery we are then going to have to find a buyer for it to resell it. We undoubtedly will have to move it because you can't leave it on the premises, you don't own the real estate. If we can't make a deal with the landlord we are going to have

828 19/1f 1 Kriser Direct 2 to move it to another site. That requires Cosmo packaging the machinery and moving it to another location. I don't think 3 that \$15,000 insurance policy is a lot at all." And that 5 pretty much was the end of the conversation. 6 Was there any discussion of the 120 day factor? 7 The 120 day factor was primarily because during that 8 period of time --I would like you to be good enough to answer the 10 question. 11 Yes, there was. 12 Would you tell me whether or not Mr. Klein said any-13 thing to you about 120 days or you said anything to him? 14 MR. BRILL: Objection to the leading. 15 THE COURT: Overruled. 16 A During the course of our conversation, and I 17 don't remember where it came, Mr. Klein indicated that within 18 120 day cycle they were going to know whether or not they had a 19 government contract and if they had a government contract they 20 were going to have plenty of cash flow coming out of the 21 government contract to pay down the loan that they were 22 advancing to Time & Micro. That is where the 120 days came 23 from.

as having been said during that conversation with Mr. Klein?

Can you tell us whether you recall anything else

24

25

1
2
3
4
4
5
0
6
7
8
9
10
10
11
12
13
14
15
10
16
10
17
17
18
19
20
21
21
22
23

jo/lf

Kriser-Direct

829

A Yes. At that same time, during that same conversation, Mr. Klein asked me in connection with the appraisal that Thaler had rendered if I would give him references concerning the appraisal that Thaler made as to its authenticity as being a good appraisal and I did send him a letter in which I gave -

- Q You say that you sent him a letter?
- A I did send him a letter.
- May I ask you to look at Plaintiff's Exhibit 10 in evid ace which is a letter dated August 30, 1966, and answer me yes or no, please, whether you recall having sent that letter.
 - Yes, this is the letter I sent on August 30th.
 - MR. STREAM: No further direct.
- MR. BRILL: I would like to ask Mr. Stream to produce the original deposition exhibit at this point.
 - MR. STREAM: You can use a copy.
- MR. BRILL: Does the Court have a copy of Exhibit
 N for identification from the last trial, your Honor? It
 will take a minute but it may be important to this
 cross examination.
 - THE COURT: What is N?
- MR. BRILL: Defendant's Exhibit N from the lest trial.
 - THE COURT: What is N?

1	jq/lf Kriser-Cross 830
2	MR. BRILL: N is a different version of
3	THE COURT: Just tell what it is. Don't assert
4	some claim about it. Is it a deposition or what?
5	MR. BRILL: It is
6	THE COURT: What is it, a squirrel or something?
7	MR. BRILL: A letter dated August 29, 1966, from
8	Howard Klein to
9	MR. STREAM: Hold it, that I may have. I will
10	find it, I am sure
11	THE COURT: It's a letter, it seems.
12	MR. STREAM: Let the record reflect the fact
13	that I have given counsel the letter he sought.
14	THE COURT: What is it?
15	MR. BRILL: I would like this document marked as
10	Plaintiff's Exhibit 38 for identification.
17	THE COURT: That is conceded to have been supplied
18	by Mr. Stream, correct?
19	MR. BRILL: Yes, your Honor.
20	(Plaintiff's Exhibit 38 marked for identification.)
21	CROSS EXAMINATION
22	BY MR. BRILL:

A Yes, sir.

XXX

23

24

25

A-1795

conversation with Mr. Klein, is that correct?

Mr. Kriser, you just testified at length about a

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, NY. - 791-1020

jq/1f 1

Industrial Plants Corporation?

3

4

2

A I have no recollection, sir.

recollection?

5 6

A No.

7

Do you see a date stamp --

8

MR. STREAM: Just a second.

9

MR. BRILL: I am using this to refresh his recollec-

10

tion.

THE COURT: Just show it to him.

11 12

A I see a stamp, August 1.

13

1966?

14

That is right.

15

On Plaintiff's Exhibit 38 --Q

16

recollection as to any time of the receipt of the letter?

17 18

THE WITNESS: It does not.

19

Q Was it the custom of Industrial Plants Corporation

20 21 to put date stamps on letters which were received, Mr. Kriser?

MR. STREAM: Just a second. Mr. Brill persists in

22

trying to use a letter but he doesn't want the jury to see

23

it. If he wants to use it he has my 100 percent consent to

24

25

offer it in evidence, otherwise he may not refer to it.

A-1798

witness said it doesn't refresh his recollection.

XXX

1	jq/lf	Kriser-Cross 836
2	A	I have to assume that is so.
3	Q	But you don't recognize this as a date stamp put
4	on by you	r office?
5	A	I do not.
6		THE COURT: What is this?
7	Q	You don't recognize the stamp of August 31, 1966,
8	as a stamp	p which was placed by your office?
9	А	No.
10	Q	But there is no other date stamp on this letter,
11	is there?	
12		THE COURT: That is an argumentative question.
13	Q	Do you see any other date stamp on that letter?
14	А	No, sir.
15	6	Aside from August 31, 1966.
16	А	That is correct.
17	Q	But that still doesn't refresh your recollection
18	as to wher	n it was received?
19	А	No, sir.
20	Q	You still insist it was received when, August
21	29th?	
22		THE COURT: I didn't hear him say any date.
23	Q	Do you remember when the letter was received?
24	А	I don't.
25	0	It was August 30th or before, is that correct?
		A-1801

1	jq/lf	Kriser-Cross 837
2	А	I don't know.
3	Q	Could it have been before August 29th?
4		MR. STREAM: Objection, that is hypothetical.
5		THE COURT: Sustained.
6	Q	Do you remember testifying at a deposition taken
7	in this a	ction during the year 1970, Mr. Kriser?
8	А	I don't remember the date. I remember a deposition.
9	Q	Do you remember giving testimony, sworn testimony
10	at a depo	sitior held on October 4, 1971?
11	А	If that is the date that is it, yes.
12	e	You do remember testifying at that deposition, don't
13	you?	
14	А	Yes, sir.
15	Q	And you subsequently signed this deposition and
16	swore to	the answers which you gave in it?
17	А	If my signature is there I did.
18	Q	This is not the original, the original is on file
19	with the	Court. I represent this is a true copy of the
20	deposition	on.
21		THE COURT: Here, this may be the original.

THE COURT: Let's have it marked for identification first, if that is it.

Q Examine the original, Mr. Kriser, and see if

23

24

25

you don't mcognize your signature.

•									
		1	Jq/11		Kriser-	Cross			838
0	xxx	2		(Defendan	t's Exnit	oit 39 ma	rked for	identific	ation.)
		3		THE COURT	: There	is anoth	er one he	ere.	
9		4		Are they	different	dates?			
•		5	1	MR. BRILL	: Yes, y	your Hono	r.	•	
		6		THE COURT	: Have t	them mark	ed separa	ately then	for
		7	identifica	tion.					
•	xx:			(Plaintif	f's Exhib	it 39-A	marked fo	or identif	ication.
		9	Q :	I ask you	to exami	ne Plain	tiff's Ex	chibit 39	and 39-A
		10	and tell us	s if you	recognize	your si	gnature o	on the bac	k of
		11	those depos	sitions,	Mr. Krise	er.			
		12	Α :	That is my	y signatu	re in bo	th cases.		
		13	Q.	I ask you	whether	you mecal	l being a	sked the	follow-
		14	ing question	on in this	s deposit	ion			
		15	7	THE COURT	: State	which on	e it is.		
		16	e 1	Plaintiff	's Exhibi	t 39 for	identifi	cation, t	he
		17	following o	question,	line 8,	do you r	emember b	eing aske	d the
•		18	following s	series of	question	s and gi	ving the	following	
		19	answers:						
		20		' Q	You say	sometime	after Mr	. Thaler	made
•		21	the apprais	sal you re	eceived a	call fr	om Mr. Kl	ein?	
_		22		"A	Right.				
		23	,	'Q	What was	the con	versation	as nearl	y as
_		24	you can red						
		25		1A	I don't	recollec	t it oth	er than t	o assume
•						1803			

1	jq/lf Kriser-Cross 839
2	"that he requested us to guarantee -
3	"Q Excuse me, you do not recollect the
4	conversation?
5	"A There was a conversation.
6	"Q Good.
7	"A And the result of that conversation was
8	that I gave them a guarantee.
9	"Q But you do not recall the exact conversa-
16	tion?
11	"A No, I don't. It is four or five years
12	ago. I don't remember really."
13	Do you remember those questions and those answers?
14	A If that is my testimony I must have said it.
15	Q That testimony was true when you gave it?
16	A I assume it was.
17	Q Four years ago, October 4, '71?
18	A Yes, sir.
19	Q And that you did not recollect that conversation
20	with Mr. Klein.
21	A That is a possibility if it says so.
22	Q You testified that you discussed this guarantee
23	THE COURT: He didn't say that.
24	MR. BRILL: I am not referring to the deposition
25	testimony.

1	jq/lf Kriser-Cross 840
2	THE COURT: Here today?
3	MR. BRILL: Yes.
4	Q Today in this trial, Mr. Kriser, you stated
5	that you had two conversations with Mr. Klein. You remember
6	that?
7	A Yes, sir.
8	Q One was to discuss his offer of a guarantee?
9	A Yes, sir.
10	Q And the other was to discuss
11	THE COURT: Was it an offer or request?
12	MR. BRILL: His proposal of a guarantee, the
13	one which you say you received before August 30th, that is
14	Plaintiff's Exhibit 8 in evidence. That was one conversa-
15	tion. And the second conversation was your letter authentica
16	ing the guarantee, authenticating the appraisal?
17	THE WITNESS: No, sir, that is not so. I didn't
18	say that. I said there was that is not so.
19	Q I didn't ask you what you said. I just asked
20	you
21	A That is not so.
22	MR. STREAM: This is argumentative.
23	THE COURT: Yes, it's argumentative. He answered
24	the question and that is it. Don't prolong it.
25	Q Mr. Kriser, do you recall testifying in this same

A-1805

"THE WITNESS: Yes.

"MR. STREAM: On the telephone.

A-1806

24

25

"A Mr. Klein at that moment wanted to know whether I would buy the equipment, whether I would guarantee the equipment that was appraised by Mr. Thaler earlier that month.

"A What equipment are we talking about?

"A At the plant of the Time & Micro Corpora-

tion which was located in Strasburg, Pennsylvania, and I told Mr. Klein that in order for me to buy or guarantee the equipment I would have to make an investigation. As I recall it I told him I would write him and inform him."

Do you remember those questions and answers being put to you?

A Yes, sir.

Q Do you recall further questions and answers:

"Q What did he say, if anything, was the reason that he wanted that offer from your company?

"A He never gave me an answer. He never offered to give me information as to why. He wanted the offer of guarantee.

"Q Did he say anything else as far as you can recall it during the course of that first telephone conversation?

"A Not that I recall."

Do you recall that testimony, Mr. Kriser?

22

23

24

25

843

"Q When did you discuss the contents of that letter" -- Plaintiff's Exhibit 10 -- "with Mr. Klein" -and this is the letter where you write to Mr. Klein stating that you can assure him of the authenticity and reliability of the appraisal report?

jq/lf Kriser-Cross

3 4 5

Q "Q When did you discuss the contents of that letter, that is to say Plaintiff's Exhibit 10 in this trial" --

a question from some other trial?

Q "Q When did you discuss the contents of that letter, that is to say Plaintiff's Exhibit 18 with Mr. Klein" -- Plaintiff's Exhibit 18 is Plaintiff's Exhibit 10.

THE COURT: I don't understand. Are you reading

THE COURT: I don't understand. You better clarify whether you are reading from some other trial or some other questions and answers or whether you are asking him a question now. Which is it?

Q I am going to read to you, Mr. Kriser, from the transcript of the last trial and you tell me whether you recall being asked these questions and answers on April 29, 1975:

"Q Tell us what Mr. Klein said to you and what you said to him in that connection.

"A He said he wanted us to either buy or guarantee this plant at Time & Micro. I told him that I would give it some thought and I would write him, which I did. I also told him, decided to make the guarantee available to him which I did. I also sent him a letter giving him our

1	jq/lf Kriser-Cross 846			
2	"bank references to authenticate the validity of the guarantee			
3	"Q Had he or had he not requested that?			
4	"A He had, yes, because he needed that to			
5	authenticate our guarantee.			
6	"THE COURT: What did he say about it?"			
7	MR. STREAM: This is not proper cross to stand be-			
8	fore a witness and read pages and pages.			
9	MR. BRILL: I am reading two questions and answers.			
10	MR. STREAM: Just a second. I respectfully object			
11	to this man standing before the jury and reading pages and			
12	pages from whatever he is reading from. That is not cross.			
13	I sure don't know what he is attempting to do.			
14	MR. BRILL: It's quite evident what I am attempting			
15	to show.			
16	THE COURT: You are attempting to impeach his testi-			
17	mony here today.			
18	MR. BRILL: That is right.			
19	THE COURT: However, not every question which was			
20	asked before is an impeachment. That is where you might			
21	exercise a little discretion.			
22	Q One more question about your last testimony:			
23	"THE COURT: What did he say about it?			
24	"THE WITNESS: I have no recall, your Honor."			
25	Do you recall givin; that answer to that question?			
	A-1811			

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

1	jq/lf Kriser-Cross 847		
2	A If it's in the testimony I am sure I did, sir. I		
3	don't have any recall at the moment, no.		
4	Q You don't have any recall of that testimony?		
5	A If that is what it says I am sure that I said it.		
6	8 But you do have recall now of your conversation		
7	with Mr. Klein?		
8	A Yes, I do.		
9	THE COURT: You are through with that area, counselor.		
10	MR. BRILL: Yes, I am, your Honor.		
11	THE COURT: Is that all on cross?		
12	MR. BRILL: No, it's not, your Honor.		
13	THE COURT: Proceed with the next question then.		
14	Q Mr. Kriser, I believe you stated on your direct		
15	examination		
16	THE COURT: Today?		
17	Q Yes, today in this courtroom in response to question-		
18	ing by Mr. Stream that one of the factors involved in setting		
19	this \$350,000 figure was that you might have to move the		
20	machinery to another site, is that right?		
21	A Correct.		
22	Q What did this \$350,000 value represent, was that		
23	an in-place value?		
24	THE COURT: \$350,000 value?		
25	MR. BRILL: Yes, referring to		

1	jq/lf Kriser-Cross 848
2	THE COURT: There isn't any such thing.
3	Q Referring to your letter of August 30th, Mr.
4	Kriser, Exhibit 10, you offer a guarantee in the amount of
5	\$350,000, don't you?
6	A Yes, sir.
7	Q For a period of 120 days?
8	A Correct.
9	Q At a fee of five percent?
10	A Correct.
11	Q Incidentally, how much is that?
12	THE COURT: What?
13	MR. BRILL: Five percent of \$350,000.
14	THE COURT: The jury can calculate that easily.
15	MR. BRILL: It's \$17,500, isn't it?
16	THE WITNESS: Correct.
17	What was that \$350,000, what type of value did that
18	represent? Wasn't that an in-place value?
19	THE COURT: It didn't represent any value.
20	Q Did that represent an in-place value?
21	A : Of course not.
22	Q Of course not?
23	A I told you that that was the price, Mr. Brill,
24	that we were willing to pay for that machinery in the
25	event that Ajax Hardware called upon us to buy it. It has

1	jq/lf	Kriser-Cross	852			
2	Q	You did say that.				
3	А	I might well have said that.				
4	Q	Do you want to look at it				
5	А	If it's there I might well have said it.				
6	Q	Mr. Thaler was responsible for the appraisal w	which			
7	was made	for the plaintiff in this case, Ajax Hardware	and			
8	Manufacturing Corporation, wasn't he, Mr. Kriser?					
9	А	He was.				
10	Q	He had the authority to issue that in behalf	of			
11	your compa	any under his own authority?				
12	A	He did.				
13	Q	You didn't know anything about what the terms	10 8			
14	his agreement with Mr. Klein were before he sent out that					
15	appraisal	, did you?				
16	А	I did not.				
17	Q	You weren't present at the meeting on August	12, '66			
18	between M	r. Klein and Mr. Thaler?				
19	А	I was not.				
20	Q	And you didn't look over the actual appraisal	which			
21	he sent o	ut, Plaintiff's Exhibits 5 and 6, before he se	ent			
22	them out,	did you?				
23	Α ¬	I did not, sir.	-			
24	Q	So the first time you became involved in this	3			
25	appraisal agreement					
		A-1817				

SOUTHERN DISTRICT COURT REPORTERS

2

3

4

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

THE COURT: He wasn't involved in the appraisal.

Q The first time you became involved with the plaintiff was when you received this phone call you say from Mr.

Klein on or about August 30th.

A That is not the first time.

Q When was the first time?

A The first time I became involved was when they -THE COURT: Who is "they"?

A When Ajax forwarded to us their request that we guarantee them \$500,000.

Q That was the first time you ever heard of Ajax?

A That is not the first time ever heard of Ajax.

Q When did you first have a communication with Ajax having to do with this appraisal or with the --

THE COURT: With or from?

Q A communication from Ajax having to do with an appraisal or anything else in connection with the Time & Micro machinery.

A Right. I had a telephone call -- and I don't recall when it was or I don't recall who it was with -- who asked us whether we could do an appraisal. They introduced themselves as Ajax.

Q Who introduced themselves?

A I don't know who it was from the Ajax Corporation,

A-1818

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

•

•

,

,

1

,

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

auction?

2

3

4 5

6

8

7

9

10 11

12

13

14

15

16

17

18

19

20

21 22

23

24

25

The people who discussed it with us in detail was a law firm in Philadelphia called Wolf, Block, Shaw, Silas and Cohen in behalf of the First National Bank of California, I think.

O Didn't Time & Micro also retain you to conduct that auction? Weren't they one of the two parties that retained you to conduct the auction sale?

A They could have been, yes, sir.

MR. BRILL: Do you have the original copy of Plaintiff's Exhibit 22 for identification during the deposition of this case, Mr. Stream?

MR. STREAM: I haven't the foggiest notion what that is. Give me the date of the letter.

MR. BRILL: The letter from Mr. Kriser to Mr. Klein dated August 30, 1966, offering the guarantee. Do you agree that that was Exhibit 22 of the deposition?

MR. STREAM: I con't agree to anything.

THE COURT: You are asking him for that exhibit. Don't ask him anything else.

The exhibit is one from the deposition?

MR. BRILL: I am referring to a deposition exhibit.

THE COURT: I don't know what it is you want.

MR. STREAM: I don't have it. Counsel says he has

7 8

a copy of it and I consent he can use it.

MR. BRILL.: Do you consent it was Exhibit 22 for identification at the deposition?

THE COURT: Show it to counsel.

MR. STREAM: I concede Plaintiff's Exhibit 9 in evidence at this trial is marked Plaintiff's Exhibit 22 for identification during the examination before trial of Jesse Thaler.

MR. BRILL: Would you agree that Plaintiff's Exhibit 38 was marked as Plaintiff's Exhibit 15 during the deposition?

MR. STREAM: I much prefer to have counsel approach me and not make an offer on the record.

THE COURT: Yes. Keep your conversations apart from the jury and not on this record, please. You ought to know it at this time.

MR. STREAM: At counsel's request I concede that Plaintiff's Exhibit 38 received in evidence at this trial was marked Plaintiff's Exhibit 15 for identification during the examination before trial of Jesse Thaler and was so marked at page 170 of his transcribed testimony.

MR. BRILL: Thank you, Mr. Stream.

Q Mr. Kriser, I show you these two documents, Plaintiff's Exhibit 38 which was marked as Plaintiff's Exhibit 15

1	jq/lf Kriser-Cross 858
2	THE COURT: That is the way to do it.
3	Q Mr. Kriser, do you remember being put these two
4	questions and answers
5	THE COURT: He wasn't put the answers, he was
6	put these questions and these answers, to be correct.
7	Q Mr. Kriser:
8	"Q Had you seen Plaintiff's Exhibit 15
9	before you wrote Plaintiff's Exhibit 22?
10	"A No, I didn't.
11	"Q You had not?
12	"A No."
13	Do you remember being put those questions and
14	giving those answers in your deposition?
15	A No, I don't recall that.
16	Q Do you deny that you gave those answers in your
17	deposition?
18	A I don't deny it at all. I didn't say that. I
19	said I don't recall that. However, my handwriting is on
20	this letter of August 29th.
21	MR. BRILL: I move to strike the answer. I asked
22	him whether or not he recalled
23	A No, I don't recall it, I am sorry.
24	THE COURT: Strike the other portion. Let's get
25	on with this prolonged cross examination.

jq/lf Kriser-Cross 859 MR. BRILL: I simply want to show him --2 THE COURT: Never mind what you want to show him. 3 MR. BRILL: I offer in evidence that portion of 5 Mr. Kriser's testimony --6 MR. STREAM: That is in evidence already by the 7 reading to this jury. It's in the record. 8 THE COURT: Sustained. 9 MR. BRILL: I have no further questions. 10 THE COURT: Any redirect? 11 MR. STREAM: None. 12 THE COURT: You may step down, sir. 13 (Witness Excused) 14 MR. STREAM: I have just two sentences to read to 15 the jury before we rest. 16 THE COURT: From what? 17 MR. STREAM: I am going to read to the jury, with 18 the Court's permission, two statements of fact which are 19 conceded to be authentic and true. That is 13 and 21. 20 These are stipulations of facts which were made by plaintiff 21 to the defendant. 22 Fact, Ajax received a total of \$249,917 from the 23 United States Government in settlement of termination claims 24 submitted by Ajax on behalf of itself and its subcontractors 25 for losses arising out of the termination of Department of

Army contract number D.A.A.09-67-C-0039.

21, fact, subsequent to March 25, 1969, Ajax received the further sums of \$72,258.04 and \$10 representing a property disposal credit under the agreement which is referred to in item 12 above and that is the termination agreement, your Honor, which was received in evidence as Defendant's Exhibit I over the signature of Harry R. Gowertz, executive vice president, and the United States of America over the signature of Salvatori J. de Simoni, attached thereto as Exhibit 12.

With that statement, your Honor, the defendant rests.

MR. BRILL: I request that the Court direct the jury of the limited purpose for which those statements were read into the record.

MR. STREAM: Not now.

MR. BRILL: Yes, your Honor.

THE COURT: Not at this time.

MR. BRILL: I do have a motion at this point.

THE COURT: You aren't going to make any motions before the jury. You have made some motions and I thought you were through with that realm.

MR. BRILL: That is when I thought the defendant had rested, your Honor.

21 22

THE COURT: The jury is now excused. In a little while you will be excused until tomorrow morning at ten o'clock. At that time will be the time for summations to be given by counsel. You may retire for a little while before I determine when you should go.

(Jury left the courtroom)

THE COURT: At this time, Mr. Brill, no motion should be heard unless it is something relating to what has occurred this afternoon before the jury.

MR. BRILL: I simply want to make a motion for a directed verdict at the close of the defendant's case.

THE COURT: Motion denied. That is, of course, somewhat unusual and it would be in a case like this, in any event.

The motion, of course, must be denied. Are you through with your motions?

MR. BRILL: Thank you, I am.

THE COURT: And you are fully rested, no rebuttal?

MR. BRILL: No rebuttal, your Honor.

THE COURT: If you will excuse me a moment I will come back and rule on the requests to charge. I assume you have each the requests of the others.

MR. STREAM: Before your Honor goes inside I would like to leave with your Honor's law secretary a copy of a supplemental request in light of the rulings that took A-1826

24

25

862

12. The following granted as charged, 2, 3, granted as

charged, 13 granted as charged; 14 is refused except as

1

3

7

8

5

6

9

10

12

14

13

15

16

17

19

20

22

23

24

charged; 15 is refused; 16 is refused. 17 is refused except as charged. 18 I believe is withdrawn.

MR. BRILL: No, your Honor.

THE COURT: It was not withdrawn?

MR. BRILL: It remains in the alternative to new request number 31, your Honor.

THE COURT: I don't know what you are talking about.

MR. BRILL: If 31 is refused then 18 remains as alternative. They both deal with the issue of compensatory damages.

THE COURT: I wish you would make appropriate designations on your papers instead of this alternative business which is absurd. This is which two?

MR. BRILL: Number 31, your Honor --

THE COURT: There was one before that.

MR. BRILL: The only two we are talking about are 18 and 31.

THE COURT: 18 is withdrawn in favor of 31 and 31 is refused.

MR. BRILL: I would reinstate 18 then, your Honor.

THE COURT: I don't know how you put alternatives, all this jibberish. You can't submit and take parts, kind of a machine system in this kind of work.

1

3

4

5

6

8

9

10

11 12

13

14

15

16

17

. 18

19

20

21

22

23

24 25 charge 18, is that it?

MR. BRILL: That is correct, your Honor.

THE COURT: 18 refused as charged. 31 refused except as charged. You can do your best with that.

18 is plaintiff's claim for compensatory damages

and what you are saying is that if I don't charge 31 I should

18, refused. 20 granted as charged. 21 granted as charged. 22 granted as charged. 23, 24 and 25 refused except as charged. 26 granted as charged. 27 refused except as charged. 28 refused except as charged and 29 likewise refused except as charged. 30 is refused; as I said before 31 was refused.

I think that is all.

MR. BRILL: There was a 32 submitted this morning, your Honor.

THE COURT: I will see if I can find it.

Do you have that, Mr. Stream, 32?

MR. STREAM: Yes, your Honor.

THE COURT: 32 is refused except as charged.

Is there a 33?

MR. BRILL: No, your Honor.

THE COURT: We are through with yours then.

Now I come to the extensive requests of the defendant's. Number 1 through 8, granted as charged. Number A-1829

9 refused except as charged. 10, 11, 12, 13 refused except as charged. Let me go back, 9 refused except as charged. 10, 11 and 12 granted as charged. 13 refused except as charged. 14 is granted as charged. 15 is refused except as charged.

The second page of the list; 16 granted as charged, 17 granted as charged, 18 refused except as charged. 19 ditto. That is refused except as charged. 20 granted as charged. 21 granted as charged. 22 refused except as charged. 23 refused except as charged. 24 is refused. 25 refused except as charged, ditto for 26 and 27. 28 granted as charged. 29 granted as charged. 30, 31, 32 and 33 refused except as charged. 35 refused. 34 refused, 35 refused, 36 refused, 37 refused except as charged. 38 granted as charged. 39 refused except as charged, 40 ditto, refused except as charged. 41 ditto, the same, refused except as charge. 42, 43 and 44 granted as charged. 45 granted except as charged. 46,47, 48 granted as charged. 49 granted as charged.

50 granted as charged. 51 refused except as charged. 52 granted as charged. 53 and 54 and 55 are refused. 56 is granted as charged. 57, 58 59 and 60 refused.

60, 61 refused as charged. 62 granted as charged. 63 ditto, 64 refused except as charged. 65 refused. 66

jq/lf

1

Jq/lf

counselor. I don't know how good they are. I have noted what you said. Any others?

MR. BRILL: Yes, your Honor.

THE COURT: Put them on the record.

MR. BRILL: I object to the refusal of charge number 15 dealing with fraud.

THE COURT: Fraud is out of the case. I don't know why I should charge anything about fraud. You are trying to raise the dead.

MR. BRILL: In a sense, your Honor, yes, just to make sure my exceptions are noted on the record.

With respect to charges 17 and 18, I except to any charge which does not fix the amount of compensatory damages at 161,895.75. With respect to 19 dealing with exemplary damages I except from the refusal of that charge and inquire of the Court whether the Court means to remove exemplary damages from the jury's consideration.

THE COURT: Of course I do. I dismissed the claim for punitive or exemplary damages. The two terms are quite synonymous.

MR. BRILL: I didn't recall any such ruling, your Honor.

MR. STREAM: If your Honor please, I am sure your Honor meant that since fraud and negligence are out of the

A-1832

MR. BRILL: With respect to the defendant's charges

THE COURT: I have my notes from which I dictated

A-1833

17

18

19

20

21

23

24

25

868

23

24

25

jq/lf 869

my determination this morning and I have one area entitled punitive damages. I said then, among other things, that I denied the claim for punitive damages.

MR. BRILL: I would like to make several specific objections to the rulings on defendant's requests, your Honor.

THE COURT: Go ahead and do it and get it over with, for heaven's sake.

MR. BRILL: I wish I could do it in 30 seconds, your Honor.

THE COURT: I wish you could, too. I don't think you can.

MR. BRILL: It will take me several minutes to go through it.

THE COURT: We will have to be patient, of course. Please proceed.

MR. BRILL: Thank you.

With respect to charge : mbe 10 which the Court granted as charged I except to any charge which does anything other than reflect the terms of the contentions of the plaintiff in the pretrial order.

THE COURT: Granted as charged naturally doesn't do otherwise.

MR. BRILL: With respect to charge 11 which was

granted as charged I object to the last clause of that proposed charge which misstates paragraph 4 of the complaint.

THE COURT: It says granted as charged.

MR. BRILL: Yes, your Honor.

THE COURT: You will have to hold that until after the charge is rendered.

MR. BRILL: A similar exception as to 12, your Honor.

THE COURT: What is wrong with that?

MR. BRILL: Insofar as it misstates the claims of the plaintiff. 15, objection on the grounds that waiver has been ruled out of the case. You said refused except to the extent there will be any charge in waiver, incorporating any proposed charge on that I except to it.

THE COURT: There won't be any reference to waiver except that it's out. I suppose you have no objection to that.

MR. BRILL: No, your Honor. 16 I except to any portion of 16 which is going to be granted on the grounds that there is no showing that the fair market value appraisal

THE COURT: What is it, a claim or a fact? Is it a claim?

MR. BRILL: It's a charge that the proof establishes a certain fact, your Honor, and I object to that.

1

3

4

5

6 7

9

10

11

12

13 14

15

16

17

18

19

20

21

23

24

25

THE COURT: That is number 16?

MR. BRILL: 16 which is granted as charged. I except to any charge where that fact has been established.

Number 17, I object again to the characterization of what the issue is for the jury as to the terms of the contract insofar as it is not as stated by the plaintiff in the pretrial order.

THE COURT: That is overruled. We are way beyond that, counselor. There is a great deal of water over the dam since that time.

MR. PRILL: Objection to 18, for the similar reason that the circumstances under which Ajax paid for the appraisal are not relevant to the issue of what the agreement was.

THE COURT: What is wrong with that? That is refused except as charged. Go ahead.

MR. BRILL: A similar objection to request number 20 which is granted as charged, reference to the payments for fair market value appraisal is not properly before the jury. A further objection to request number 20.

THE COURT: You just mentioned 20.

MR. BRILL: This is a further objection that if indeed a fair market value appraisal was supplied by the defendant but it was supplied negligently and misled the

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

-

execution of the loan and security agreement on August 18th but we have a further claim of reliance that we relied on the appraisal in entering into the actual loan guarantee agreement with the bank on September 1, 1966.

THE COURT: You object unless what?

MR. BRILL: Unless the second part of that is included as well as the first part.

THE COURT: Okay.

MR. BRILL: 46 with respect to mitigation, your Honor stated that 46, 47, 48, 49 and 50 are all granted as charged and I except to all of those and two particular things I except to is any notion or any scent, any mention of a failure to mitigate as opposed to an actual mitigation which is contained in some of these requests to charges and a further exception to any mention of the \$249,000 unless it's explained as in the ruling of this morning.

52 granted as charged, I object to the inference to the jury that has total discretion to award any amount up to 151,895.75 unless that sum is adequately explained to the jury as to what it represents and as to how the jury should go about calculating compensatory damages and the factors that go into compensatory damages.

I don't have 65, your Honor.

THE COURT: If you don't that is your own fault,

2

3

6

7

9

10

5

12

11

14

13

15

17

16

18

19

20

21 XXX

22

23

24

25

not mine. You have to take care of your own papers.

MR. BRILL: Labeled 23-A, is that right?

I except to it.

THE COURT: What number are you talking about?

MR. BRILL: 66.

MR. STREAM: He has noted his exception to it.

MR. BRILL: I except to the granting of 66 as charged and in case I missed to anything in going through I except to any of the defendant's --

THE COURT: Give Mr. Brill one of the special verdicts.

MR. STREAM: I can state immediately that there is no objection on the part of the defendant of any part or portion of the proposed special verdict.

THE COURT: All right. I will ask that a copy of this be marked as a Court exhibit.

MR. BRILL: I request for some time to look over the special verdict.

THE COURT: Go ahead.

(Court Exhibit 1 marked.)

THE COURT: Whenever you're ready.

MR. BRILL: This is a very serious question, -

your Honor.

THE COURT: I don't care how serious they are. When A-1839

1 19/11 875 you are ready, speak. 3 MR. BRILL: I don't think counsel should be forced 4 to rush in to decisions. 5 THE COURT: Nobody is rushing you one bit. I am 6 just simply asking if you have any objections and I will 7 wait until you answer if it's until five o'clock, if necessary. 8 MR. BRILL: Thank you, your Honor. 9 THE COURT: I don't think it's necessary. 10 MR. BRILL: It may be. 11 THE COURT: I think there is a reasonable limit. 12 counselor, if I may say so. 13 MR. BRILL: The first objection --14 THE COURT: Is there any objection to number 1? 15 MR. BRILL: Yes. The first objection to number 1 16 is that number 1 misstates the terms of the contract as 17 plaintiff claims them to be. 18 THE COURT: What do you say it should say? 19 MR. BRILL: I would rather write it before 20 speaking. 21 THE COURT: Write it out then and you will have it 22 down in black and white. It seems to me that it's an accurate 23 statement of what the claim is. 24 MR. BRILL: The question which plaintiff proposes in 25 substitution for question number 1 is whether the plaintiff A-1840

-

1 jq/lf

Ajax has proved by a preponderance of the evidence that on or about August 12, 1966, the defendant Industrial entered into a contract to appraise the machinery and equipment at the Time & Micro plant to determine whether the Time & Micro machinery and equipment would have sufficient value as collateral to assure Ajax protection on the loan or guarantee of a loan of approximately \$250,000.

THE COURT: What do you say to that?

MR. STREAM: That is a total fuzzing of what is a clear --

THE COURT: I refuse to make that change, counselor.

Any others?

MR. BRILL: With respect to the format in which the question is phrased now, the contract that plaintiff claims does not necessarily include the three elements which the Court has placed in this question, that is the sale --

THE COURT: What three elements?

MR. BRILL: The three elements are what could be realized from a sale. That is the first element. The second element is of individual items of machinery and equipment at the Time & Micro plant and the third element is at a forced sale or a liquidation sale.

THE COURT: It says it right there. Are you through now? I won't interrupt if you are not through.

MR. BRILL: I am not through. The jury may well determine that the contract, for example, did not include the notion of individual items of machinery and equipment; and if they so determine, the answer to question number 1 would be no but plaintiff may still have a valid cause of action for a breach of contract if it asked the defendant to supply the liquidation value of this machinery and defendant gave it as a lump sum negligently or defendant failed to give a proper independent appraisal of the lump sum liquidation value.

We are not claiming as breach of contract the difference between a lump sum liquidation value and the failure to get individual items. The individual itemized liquidation value is not a question for the jury.

THE COURT: Are you through now?

MR. BRILL: Yes.

MR. STREAM: Your Honor, counsel's difficulty in expressing his objection as is evident from the way he just phrased it is because he expects the jury to have an opportunity to take a green viewpoint and a blue viewpoint and maybe come out with a purple viewpoint. That isn't the way it works. The contract is the way the Court has stated it in proposition 1 and it's clear and succinct and direct and I don't see any reason to change it.

THE COURT: I refuse to change it.

 MR. BRILL: I except to that ruling most strenuously.

THE COURT: You strenuously objected. I w ll

agree it's strenuous. Very well, that is it. You have some

more objections?

MR. BRILL: Yes. Plaintiff excepts to the inclusion of the reliance of the appraisal as a separate and specific item included in the question of the consequential damages.

THE COURT: Let's have all of yours so we will get them.

MR. BRILL: I will give the rest of them. I except once again with respect to this special verdict particularly to the lack of inclusion of negligence as a separate question or the inclusion of negligence in any way.

THE COURT: I have already ruled on that, counselor. What else?

MR. BRILL: I again object and I again object strenuously to question number 4 which just as in the last trial suggests to the jury that they can pick a number out of the air and fill it in and then afterwards Mr. Stream will come running to this court and say, "Your Honor, they picked \$60,000 this time, everybody knew it had to be \$160,000."

THE COURT: What do you think I should say in 4?
This is a damage special verdict. It's not a charge.

MR. BRILL: I think your Honor must withdraw the issue of the amount of compensatory damages from the jury's discretion.

THE COURT: That has been made and denied. You asked for a directed verdict on that and I denied your motion, didn't I? If you want to make it, make it and I will deny it now.

MR. BRILL: I did make a motion but I am not directing --

THE COURT: I ruled no on it. Do I have to go over it again?

MR. BRILL: I am not requesting a verdict in that sum. All I am requesting is that if the jury should award damages that those damages have to be fixed at \$161,895.75 cents under the same logic --

THE COURT: Not with the contention about the 20,000.

MR. BRILL: At that amount subject to a possible deduction of \$20,000 as in the charge or the special verdict question which I submitted to the Court this morning.

THE COURT: These aren't sentences even. Special verdicts have to be sentences. Have you a copy of this?

MR. STREAM: Yes, sir.

THE COURT: Is there any merit to this?

MR. STREAM: Let me address myself to it, your Honor. Counsel has asked for a directed verdict which means he would like the Court to instruct the jury to return a verdict in his favor for \$163,000. Life is not that simple. The jury is entitled to return a decision on general damages in precisely the way that this court has stated it in the damage section of the proposed special verdict, particularly where it is the duty of a plaintiff to mitigate damages and I am not talking about \$20,000, I am talking about a common law obligation on the part of a plaintiff to mitigate damages and I ask the Court to let the jury decide damages in precisely the way it would if they were left with a general verdict problem and that is what this court has done in question 4.

THE COURT: Go ahead.

MR. STREAM: Let me briefly continue and finish this. The question of reliance is, of course, covered in item 3 of damages. There is nothing in there that counsel could possibly object to short of being granted a directed verdict. So far as 4 is concerned, this jury upon the general instructions and charge of this Court will know precisely what it has to do. It may come back with zero. It may come back with something else. If in my good judgment there is a verdict for the plaintiff and in my good judgment

that verdict represents a compromise I will come back with a motion and the Court will decide whether or not to grant it. But that isn't before the Court now. So far as I am concerned I can't think of any fair way of presenting this case to the jury than in the questions, the four questions which are reflected in parts one and two. I ask the Court to adhere to it.

THE COURT: All right. That is it then, gentlemen.

MR. BRILL: I would like to respond to that,

your Honor.

THE COURT: What is there to respond to?

MR. BRILL: Mr. Stream now states that there is a common law obligation to mitigation of damages which somehow will be before the jury and that somehow he is suggesting there is some way they might be justified in bringing in a sum less than \$161,000 setting aside this question of the \$20,000, let's put that aside for the moment. If that were so, your Honor, then why are we going through this second trial. We might as well go back and reinstate the first verdict. It's an outrage --

THE COURT: I set this aside and you can go to the Court of Appeals and attempt to reverse me on that. They seldom reverse a judge, a trial judge when a verdict is set aside. I am not going to reverse and ask for an autopsy on that.

1

24

25

jq/lf

1 887 jq/lf exhibit. I won't eliminate it, I simply refer to plaintiff's 2 3 exhibit 3 -- I beg your pardon, it's plaintiff's exhibit --THE COURT: Is it listed on here? 5 MR. BRILL: It's 30, your Honor. 6 MR. STREAM: Yes, Plaintiff's Exhibit 30. 7 THE COURT: It's in anyway then. Then it's out on the defendant's list. 9 Any others? 10 MR. BRILL: H is identification only. 11 THE COURT: H is out. Any others? 12 MR. BRILL: No. 13 THE COURT: All right. That should be marked 14 whatever the number will be. 15 I am proposing that all exhibits be sent in to the 16 jury when they go out to deliberate together with these lists 17 of respective exhibits. I hear no objection to that. 18 Is there any other special feature outside of my 19 statements about the notetaking? 20 Let the record show that each lawyer is being given 21 a copy of the new special verdict, Court Exhibit 3. The 22 change is what appears in part 5, isn't it, Mr. Page? 23 MR. PAGE: 4 and 5, Judge. THE COURT: All right, 4 and 5. 25 MR. STREAM: May I speak to it, Judge? A-1848

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

jq/lf

THE COURT: Yes.

MR. STREAM: I believe --

THE COURT: This is merely in order to avoid any confusion with the jury on damages. That is, if they get that far.

MR. STREAM: I believe that 4 and 5 are the result of a misunderstanding of the nature of the defendant's claim of mitigation. We take -- let me see if I can make it simple and short.

THE COURT: What do you say that the statement should be?

MR. STREAM: I don't see any purpose to these revisions in the second part of the special verdict. Here is the reason -- and I am talking about 4-A, a reference not to exceed \$20, a reference to that figure --

THE COURT: Where is that? That is a reference that Ajax put a claim in --

THE COURT: What you say is that the 20,000 should be out?

MR. STREAM: Absolutely out.

THE COURT: I think I decided that all would be out except the 20,000.

MR. STREAM: Let me explain why I think that is error.

A-1849

1

3

4

5

7

9

10

11

13

14

16

17

18

19

20

21

22

24

25

MR. BRILL: This is not the time to rehash that when we are about to start summations.

MR. STREAM: The Court may want to change its decision.

MR. BRILL: If we are going to go back into this whole question we might as well change the summations.

THE COURT: Just keep quiet. Maybe I won't change it. Your fears may be unnecessary.

MR. STREAM: The \$20,000 figure here is a figure which Ajax says was the portion of its claim to the government which represented an amount inbehalf of Time & Micro. Our position is that Time & Micro's claims to the government are no concern to us. I don't care how much money Time & Micro got. That isn't a part of this case. What is a part of this case is how much Ajax got. It isn't that Ajax put a claim in behalf of Time & Micro for \$20,000 because Time & Micro isn't asked to mitigate its damages, it's Ajax. It's the fact that Ajax got \$249,000 for the government of which Ajax says \$20,000 was payable to Time & Micro. But Ajax says that a large part of the balance was payable to other subcontractors. Whether they were paid is something for the jury to consider. Our claim of mitigation goes to the fact that Ajax got \$249,000 and has failed to explain what it did with it. I don't understand this Time & Micro 20.

. |

2

1

3

4

6

5

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. BRILL: I must say I am shocked --

THE COURT: Don't be shocked at all, counselor.

This is a lawsuit, it isn't a pinochle game.

MR. BRILL: Your Honor ruled specifically after lengthy argument yesterday that the mitigation proof in this case did not extend to anything beyond the \$20,000 which Ajax received on behalf of Time & Micro.

THE COURT: I am inclined to deny the application by the defendant to change B.

Anything else, gentlemen?

MR. BRILL: If I may request that your Honor direct
Mr. Stream at this time not to address in his closing statement any of the balance of this money as a possible mitigation
in this case.

THE COURT: Yes, I do. I am required to do so.

MR. BRILL: Thank you, your Honor.

THE COURT: Anything else?

MR. BRILL: I have no objection to questions 4 and

5.

MR. STREAM: I do not concede \$161,869 is not the amount of wamages. I don't concede that and I object to going to the jury with a statement like that.

THE COURT: Please give me a revision of that. As a matter of fact, I discussed this with Mr. Page this morning

A-1851

as to A. How would you word it?

2

1

3

4

5 6

7

9

10 11

12

13

14

15

16

17

18

19

20 21

22

23

24

25

MR. STREAM: I would leave the figure for the jury to fix. I don't think it's right. I think as far as 5 is concerned if the Court is going to talk about mitigation and limit me that way I think that the Court should sav what is the amount to which the plaintiff is entitled to damages. period, and let the jury fix it. But to tell the jury here it is, 161, take off 20 and you have 141, you might as well tell the jury to come in with \$141,000.

THE COURT: That is a matter of evidence and for the jury to decide. The question here is how to word it.

MR. STREAM: 5, I suggest, should simply read what is the amount to which plaintiff is entitled for damages.

MR. BRILL: Your Honor, I suggest that you bring this in to the same track we had last time. Furthermore, there is a very specific reason for separating out --

THE COURT: Look, Mr. Brill, I assume this time that both sides will argue damages. It wasn't argued one bit at the first trial and that was one of the basic reasons wh, the jury went astray.

MR. BRILL: I suggest very firmly that there is nothin to argue. There is no proof in this record that the damages are anything other -- if there are damages at all.

> .THE COURT: That is for the jury to decide, I think. A-1852

MR. BRILL: Not if the jury can only reach one verdict on the evidence as your Honor found at the last trial.

MR. STREAM: I propose to argue that that is not the amount to which the plaintiff is entitled.

MR. BRILL: We have the same proof at this trial as the last trial.

THE COURT: I don't want to hear about the last trial. It has nothing to do with this trial. We must put in something here.

MR. STREAM: If I may use an expression, we are dying from improvements. I suggest to this Court that the special verdict which this Court put together the other day is sufficient if this Court will charge the jury, and although I respectfully except, the matter can be covered by a charge to the jury that if the jury reaches the issue of mitigation it may not allow more than \$20,000, period. But to put that before the jury is to say to the jury, look, you are going to get the damages, take a figure and take off \$20,000, I think that is wrong, to give the jury that kind of mathematical equation.

THE COURT: I think A must be changed.

MR. BRILL: Your Honor --

THE COURT: You are going to sputter some more.

A-1853

18

19

20

21

22

23

24

25

893

MR. STREAM: May I walk up and suggest if 4-A is left intact and this is out, that becomes 4 and 5 simply becomes what is the amount to which the plaintiff is entitled

as damages and this is out, you are in perfect shape.

A-1854

-

 around all over the place.

MR. BRILL: No, your Honor.

MR. STREAM: Agreed.

MR. BRILL: If the jury comes back with a verdict in that form --

THE COURT: I have to decide this. I can't putter

THE COURT: You go out. I am not going to putter around any longer.

I have decided this: 4 is out, 4-A and B. 4 altered is this: what is the amount to which plaintiff is entitled for damages. 5, the amount by which said damages are reduced by reason of recovery received by the plaintiff from the government if any, not to exceed, and I do that because I limited this proof. You can take exception if you please but you don't need to. That will be A of 5 and B will be balance. I am not going to fool around any longer.

MR. BRILL: I do except to the changes which your Honor did make. I object to the changes in the special verdict.

THE COURT: I changed it and that is it.

(In open court - jury present)

THE COURT: I have one statement to make to the jurors. One of the jurors, I believe juror number 6, has asked if she may take notes. This must be confined, obviously,

and including the charge. Of course, the basic facts to consider with respect to those facts, the testimony and the evidence from the exhibits is a separate thing. However, those who wish to take notes may do so. You don't have to, let me make that perfectly clear. The notes are not to be used except for the benefit of the individual juror who takes those notes and I will allow the alternates to take notes if they wish because they might be called in subsequently to deliberate although it is most unlikely at this point.

How many want to take notes? Just one. Let it be noted that juror number 6 is the only one who wishes to takes notes. You may give this juror a pad and a pencil.

Now you will hear the respective summations, ladies and gentlemen. These summations, I state to the jury, must be based upon the facts or proof adduced, whether it's by testimony or whether it's by exhibits. Both may be mentioned. However, it is your duty not to consider anything mentioned in the summations unless the plaintiff is there to sustain that contention. Under our proceedings in this court the order of the summations by the respective attorneys is reversed. At the commencement of this action the plaintiff spoke first, the plaintiff's lawyer. At this time on summation the defendant's lawyer will go ahead and there will be no rebuttal.

1

3

5 6

7

8

9

10

11 12

13

14

15

16

17

18

19

20

21 22

23

24

25

Therefore, I ask Mr. Stream to speak for the defendant.

MR. STREAM: Thank you, Judge Levet.

Mr. Foreman, ladies and gentlemen of the jury: I was coming into court this morning when it occurred to me something that I had heard as a very young lawyer which began to happen in this courtroom during the last week. If you can't hear me, let me know.

There is an old proverb among lawyers that when you have a good case on the facts, talk about the facts, and if you have a good case on the law you talk about the law. If your case is bad on the law, talk about the facts. And if your case is bad in the law and the facts, you pound the table and you cry as much as you can in order to develop a sympathetic empathy. I want you to forget age, rank and serial number of counsel, Bench and bar and remember that you folks, six individual mentalities, plus the alternates, of course, are required to judge evidence that has come before you, not the performance of counsel for the plaintiff, not the defendant's coursel's performance but the evidence. It is very important for you to disassociate yourself from us. We are spokesmen only. We are not parties or participants except in the legal sense of being the service of proof, and sympathy and empathy don't belong in the jury box. That is either for or against me. I am talking with complete dis-

2

3

4

5

6

7

8

9

10

11

12

13

14

15

17

19

20

21

22

23

24

25

passionateness.

I represent a defending party, Industrial Plants Corporation. I could stand mute. I have no obligation, which is to say, the defendant has no obligation to do anything but let the plaintiff make his case. His Honor will describe that to you in his instructions. It's called the burden of proof. The defendant needed to do nothing except allow the plaintiff to try to prove a case by what his Honor will describe as a preponderance of the credible testimony. That means something more than just a little bit of a change in the balance, it means a jecided tipping of the balance, so much so that it represents a preponderance of proof. I have chosen not to sit mute. I have chosen to make as strong and affirmative case as possible. My affirmative case was made through the exhibits and through the lips principally of the plaintiff's witnesses. Plaintiff came into this case on a very narrow issue, and I will outline that issue for you in a second. He came to this case on a very narrow issue. It began Tuesday, Wednesday, Thursday, Friday, Monday and again on Tuesday, seven days of testimony. Six or seven days of testimony to prove a narrow point. We think the plaintiff did protest too much. The defendant came forward and presented this case in 15 minutes. It doesn't mean that represents a balancing but it gives you an idea of perspective. You are

A-1858
SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE
FOLEY SQUARE. NEW YORK, N.Y. - 791-1020

1

3

4

5

7

8

10

11

12

13

14

16

17

18

19

20

21

23

24

25

not microcosms sitting there looking there at dots, commas and words. You have to get a big picture. I told you that at the beginning. Stop and ask yourself, why should it take a plaintiff six days of proof to establish a narrow point. We think the plaintiff did protest too much.

In my summation I will take up some of the evidence, not the minutia. I am not going to read you from pages of the deposition which are on the desk of counsel for the plaintiff. I am talking to you about the exhibits, you can touch and feel, not the words of witnesses which are malleable depending on dispositions. I might point out to you also in these preliminary remarks, for bet about television. You now know that what happens in television is something far and apart from what happens in a courtroom. There are no monstrous liars and nobody has a monoply on truth. I can state without fear of contradiction from either the Bench or from my adversary that there are no monumental liars in this case. As a matter or fact, so far as I am concerned Mr. Klein told the truth as best as he could recall it and so did all the other witnesses tell the truth as best as they could recall it. Nobody stood up and perjured himself. We ain t got that kind of case. I am not going to namecall. There is no need for it. I am going to rationalize for you and show you what happened here after six days of proof on a

A-1859

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

very narrow question of fact.

So, ladies and gentlemen, we begin with fundamentals. Again if I may just state one more preliminary minute and bore you, I was coming in this morning by train and I was reading from Thomas Mann's "Magic Mountain". Infit I found a most apt quotation. I am not trying to be a pedagogue but it happens to fit. In it there is a character called Celbrini, a beautiful personality, and in it he says, "What is the use of classification and arrangement of material, let me tell you," he says, "order and simply fixation, order and simply fixation, are the first steps ward the mastery of a subject, the actual enemy is the unknown."

I am going to take you out of the presence of the enemy ardorganize this data for you.

What is this issue? What is the only, single, the exclusive issue which you have to consider? We contend, and his Honor will in due course instruct you along these lines we hope, but we contend that the one issue that you have got to resolve is did Ajax order and did Ajax pay for a fair market value appraisal? Put aside whatever else Mr. Klein may have asked for, also requested by ways of opinions, also sought. Put aside whatever Mr. Louis asked for and expected. By the way, we never did find out why Mr. Louis failed to come in and testify in behalf of Ajax.

A-1860

Ever that in mind, it bears thinking about. Put aside whatever else Mr. Klein or Mr. Louis asked for. Ladies and gentlemen, it is our contention that if a fair market value appraisal was asked for and paid for that is the end of the case. It is really that simple. Because it is our further contention, and there is no dispute about this, Mr. Sinclair and Mr. Klein readily acknowledge this under oath in their own candor and honesty, a fair market value appraisal is altogether different from an appraisal of machinery and equipment intended for sale item by item at an auction sale under an auctioneer's hammer. It's a totally different thing.

So different, in fact, that Mr. Klein acknowledged and Mr. Sinclair acknowledged that a fair market value appraisal could under no circumstances be used as a test or as a guideline for determining how much machinery will bring at a forced auction sale. That is a critical point because if they got a fair market value appraisal, and that is what they asked for and that is what they paid for, and they knew they got a fair market value appraisal, and I will show you they knew it, that is the end of the case. Because they could under no circumstances have relied upon a fair market value appraisal to determine how much machinery was going to bring at a forced sale at auction 14 months hence, even assuming

1

4

5

6

7

9

8

11

10

12

14

15

16

17

18

19

20

21

22 23

24

25

that they ever intended to get the appraisal for that purpose and they didn't. We will show that as we proceed and analyze the evidence.

Bear in mind that the issue as we see it is did Ajax order and did Ajax pay for a fair market value appraisal. You may be asked the question in reverse. You may be asked, so far as I know the Court may ask you to decide did Ajax order and pay for an appraisal of the machinery and equipment item by item at a forced sale in liquidation and the answer as far as I can see is no. And if that is the answer that is the end of the case. There is nothing left to be decided. I don't care if counsel talks for four burs, you keep your mind and your eye on the ball, on the donut, and don't forget, I can't get up after he malks and say he made a mistake, he didn't state it properly. You have to remember what I say. It's my last chance and you make the answers that you are hearing me put to you now if he gets up and says something different. If you don't remember them depend upon the Court. The Court in its own wisdom will make the final statement for you which will give you the basis for going into the jury room and reaching a verdict.

Where do we start? Let's start with the complaint.

After all, that is how this action started some nine years

ago. Let's start with the complaint because after all it was

23

25

the complaint which framed the issues primarily and later on the plaintiff made some additional contentions and you will hear them ad nauseam, I assure you. But the complaint is what is filed in court and signed with the name of a partner. Poletti & Freidin, signed May 5, 1969. Let's see what he said. Remember the issue. Let's see what he said the plaintiff ordered. He said, he being counsel for the plaintiff. the plaintiff said in paragraph 4 that on August 12th something happened. Let me give you a couple of critical dates so we can put them in perspective. I was going to use the blackboard and it was suggested I not. Let me give you critical dates. August 12, 1966, Jesse Thaler visits Nr. Klein for the first time in his life. That is a Friday. August 15th there is an appraisal of Time & Micro. August 17th, which happens to be a Wednesday, Mr. Jesse Thaler seit a telegram, just a telegram, out to California, sends it, sends it August 17th. On August 19th, which is a Friday, for the first time the appraisal, the finished appraisal is sent with a letter of transmittal and an invoice to Ajax at the City of Love or the City of Industry or the city of something in Los Angeles. Another critical date, on August 23rd Mr. Louis thanks Mr. Thaler in a letter for sending the appraisal and says we would also like your opinion on something else. I am going to find out why suddenly at

A-1863

point he said we would also like. Those are the critical dates and we will get to the later dates with the guarantees and all that stuff. But keep in mind that completion of events and the hurry and the urgencies and the exigencies imposed by Mr. Klein upon Mr. Thaler to do it and do it fast. There is no escaping it. He said it. I told you at the beginning, there are no liars here. There are differences of viewpoints, a little skillful steering of words but there are no lies, no big lies anyhow.

What does the complaint say? The complaint says that on August 12th in contemplation of a loan and security agreement it doesn't say in contemplation of Ajax lending money; it says in contemplation of a loan and security agreement, and you remember that that loan and security agreement was a joint venture agreement. It was called a loan and security agreement but it's before this Court. It's before you and you are going to have the exhibit anyhow. This is a joint venture a document which says that Ajax will go in and do as it likes in that plant. Ajax can buy the stock, 15 percent of the stock of Time & Micro and it can either lend money or it can guarantee money if it chooses but for only 120 days. We are going to find out why that 120 days. If it doesn't and it decides not to, all it has to do is pay \$20,000 to Time & Micro and it's off the hook. That is the loan and

3

1

5

6 7

8

9

10 11

12

13

14

15

16

17

18 19

20

21

22

23

security agreement to which the complaint addresses itself. On August 12th the contemplation of that agreement plaintiff entered into a contract, says the complaint, in New York, it adds, to agree to do what? Whereby the defendant agreed to appraise the machinery and to report true market value. That exhibit will not be before you but remember those words, they are the plaintiff's words, true market value. The complaint didn't say that the plaintiff asked for an appraisal of the amount that the machinery would bring at a forced sale in liquidation. For goodness sake, let's not get lost in a welter of detail. Keep your eye on the ball. It's simple. I don't care if the plaintiff took another 40 days to try his case. It doesn't make it more complex. It just presents a burden to you. The plaintiff's complaint says they wanted a true market value appraisal and, they say, that on August 17th they got a preliminary appraisal report. Then they say that on August 19th that preliminary appraisal report, they obviously mean by telephone call, it was confirmed by a telegram on or about August 19th. On or about August 10th, that is what the complaint says. Remember the business about the telegrams being sent and how counsel insisted it was received before the loan and security agreement was signed on the 18th, because it was signed on the 18th all right, there is the date and initials. You will get it in the jury

2

1

5

6

8

10

11

13

15

14

16

17

18 19

20

21

22

23

24 25 room. The complaint says on or about August 19th defendant confirmed the telegraph appraisal report and he did. It was received on the 21st or the 22nd.

Now, plaintiff says that it then relied upon that appraisal report when it signed the Time & Micro agreement. Absurd. It wasn't there that time, only a telegram was there. We will get to the details later. He finally says the plaintiff. and listen to this classic non sequitur and if there is an error, if there is a mistake, I won't brand it a lie, I will just brand it politely a misstatement; if there is a misstatement in this case it is contained in the paper filed by this gentleman by his law firm because the complaint then says, this is what they said was the breach of a contract -- mind you the contract was to provide -- I am not going to guess at the words. They are imbedded in this document. Having provided the true market value, the true market value of the machinery and equipment the defendant breached the contract. How? They breached it because having represented in that appraisal that the machinery and equipment in-place was worth \$1,056,000 it was sold 14 months later for \$145,000 and, therefore, there was a contract breached. I don't care if Houdini stands up here, you can't make that statement sink right. It doesn't fit. It represents an effort on the part of counsel to confuse two totally different terms. He

20

21

22

23

24

25

says yes, okay we ordered a fair market value appraisal, we got a fair market value appraisal but he says the figure wa. ... ong and, therefore, you broke your contract because 14 months later the machine was sold at an auction sale for \$146,000. I submit to you that this is a flimflam. It's nothing short of a flimflam. The plaintiff also -- and we are going to get now into the evidence of this breach of contract to show they got what they ordered but I am covering broad strokes and I will come down. Remember I told you in the mening statement that the plaintiff said to himself, well, let's try it all ways. You broke the contract, you committed negligence, you committed fraud so we will have count 1 breach of contract, we will have count 2 negligence and count 3 fraud. Well, the only issues which you are going to resolve, ladies and gentlemen, are counts 1 because counts 2 and 3 have been dismissed by the Court, dismissed on motion, out of the case. Count 2 on negligence is out of the case. Count 3. fraud, out of the case.

We are going to talk about breach of contract now because that is all that is left here, breach of contract.

Mark my words as sure as I know that I am standing here with few hairs on my head, very few, counsel will do his very best when he sums up to make this back into a negligence case.

You watch, because really that is the only thing that he can

try to do because a contract there was and a contract was performed.

Now the evidence. First on the contract itself, the terms of the contract, and I am going to try to show you that plaintiff engaged the defendant to do a fair market value appraisal, like the plaintiff says it asked for in the complaint. He is going to say yes, a fair market value appraisal but it was expected for a loan. But the complaint didn't say pick and choose the appraisal that we asked you to make for us, Mr. Thaler. The complaint said we ask for a fair market value appraisal. Remember that. Not only does the complaint say that but so does everything else in the record.

For example, when the appraisal was received the appraisal said, Exhibit 6, the appraisal talked about in-place value. It talked about fair market value, in-place value. You will have it in the jury room. There isn't anything in there that talks about liquidating values, values item by item in a forced sale at liquidation, it's a fair market value appraisal. Now we will get to the question of whether it should have put down the dog tag numbers and God knows what else of each and every item. That was really negligence. We are talking about breach of contract now, that is all that is left here. The plaintiff may also say if it's fair market

24

25

why did he put the individual item values down? Because that is the way you do it, said Mr. Sinclair, the world's greatest appraiser and the former president of the international and still president of the domestic and the fellow who offered his expertise is still trying to get out of Drexel College. He still doesn't have a degree. I am not finding fault that he hasn't got a degree but after nine years he doesn't have a degree. He said this is a terrible appraisal, and putting these figures down, that means, I suppose, that it is really a liquidating value appraisal. But it was called fair market value, every word, ery line and the end in-place can only mean in-place ready for operation. So I got out of a friend of his, I guess he wasn't such a good friend, a copy of one of his own appraisals and there was a big fuss and bother then when counsel made certain pejorative remarks and he withdrew them and that is okay, everybody does things when he he is excited. For crying out loud, I do them, too. Nobody should hold anything against him for that. We finally got the appraisal in here and there were charges that somebody had played games with it but he finally admitted when he came in the next day with his own that whatever more was there the sheets that he identified were part of it and all I wanted to use the appraisal for was to show that in this fair market value in-place, the exhibit J and J-1, he also put down individua

25

values and in the preliminary statement he said that you have to do that because when you strike a fair market value in-place you do it by taking all of the elements and adding a factor to it because there is a certain intangible value derived from the fact that everything is there, in-place, turn key, ready to start. That specter flew out the window. How come the component figures are in there? Also the credibility of the witness which said this is a bad appraisal, it shouldn't have the individual values and yet his own appraisal turned up both with the comments I have stated and the figures I described to you. Whatever counsel says about the other exhibit that came in in full it didn't change these pages and I don't care about the other pages. Let him drag that herring all he wants. The pages I was interested in was the evaluation of a fair market value appraisal in-place and the way it was done. By the way, you will see he listed very few serial serial numbers. He didn't show costs and he didn't show condition or obsolescence. He didn't show you that stuff which he said was so critical, such a critical failure on the part of the appraiser. Even though everybody knew from day one that what was wrong with that appraisal could only be used for a fair market value in-place, it couldn't be used for an appraisal. That is the biggest red herring. The form of an appraisal that couldn't be used for

1

3

4

5

7

8

9

10

11

13

14

15

16

17

18

19

20

21

22 23

24

25

purposes that the defendant said it used it for to determine how much it was going to get if it ever used that equipment at an auction sale.

With that we have a letter from Mr. Thaler which described in detail, Plaintiff's 5, the fair market value in full as reflected in the appraisal, not the liquidating value, the fair market value. He didn't leave it at that. He sent an invoice to them for professional services rendered and he pointed out that his computations based upon an appraisal of \$919,000 total fair market value, not liquidating value. See, all the documents are responsive to what the plaintiff said happened. They asked for a fair market value appraisal and they got a fair market value appraisal and they paid for a fair market value appraisal. You have to stop and think. You can't leave your sense at the doorway and come in here and become philosphers. You have to be rational, logical, pragmatic people thinking as people think in the ordinary market place, in hospitals, in the walks of life. If you had received a bill for \$4,000 as a company official for a fair market value appraisal and you see in the appraisal and you said for crying out loud we didn't ask for this, what would you have done, you would have said take it back, it doesn't help us a bit. Take it back. You certainly don't make me pay for it. And if I pay for it what clearer, more

1

4

5

7

9

8

10

11

13

14

16

17

18

19

20

21 22

23

24

25

cogent evidence is there that they pay for what they asked for? They sure dropped the lawsuit in us fast enough when they had a little loss two or three years later. why didn't they sue Industrial right away for getting the wrong kind of appraisal, and they knew it was wrong if they expected a different one because from the very beginning they knew there were no liquidating values in this appraisal. Everyone said that, even Mr. Klein said he never got a liquidating value appraisal. That is his oath in this courtroom, we never got an appraisal of values at forced liquidation. And didn't make any steam about it because they have money for it and there is nothing wrong with that. If they got what they ordered that is the end of this case. Every time a lawsuit is filed doesn't mean that there has to be a recovery. I wish it was so. I wish every time I suffered an injury or one of you suffered an injury that you could go out and recover. But the law doesn't permit that. Sometimes a person has to take his loss if indeed there was any loss to the plaintiff in this case under any circumstances. We will get to that in the course of time.

So further buttressing the argument is the fact that Mr. Louis as soon as this appraisal came in on the 21st wrote a letter to Mr. Thaler and he said thank you very much, August 23rd, Plaintiff's 7 in evidence. Plaintiff

put this into evidence. Mr. Louis writes to Mr. Thaler, thank you very much, it was indeed an imposition to ask you to apprain this plant on such short notice. We have your appraisal and we thank you for it. He said it, but since, he goes on, Time & Micro is so anxious to come to a preliminary understanding we had to have some basis upon which to go, some basis, any basis, just something so we had to ask for your cooperation and we got it. You speak of the value of the equipment and it's fair market value. Those are his words. You speak of the value of the equipment as fair market value. So Mr. Louis says yes, that is right, that is what we not. Then he says as Mr. Klein discussed with you we would also like, for our own information, what in your opinion the equipment would bring under a forced sale.

Please pay attention to this, ladies and gentlemen. We would also like for our own information your opinion, our information, your opinion -- not an appraisal, just an opinion for his own information. Why did he suddenly ask for the statement of an opinion as to liquidating value and not an appraisal? For this very obvious reason. You saw how I hammered out of these various witnesses the fact over some considerable objection the fact that there were pending at the time very active negotiations on the part of Ajax to secure a \$3,000,000 government contract and they got it in October,

A-1873
SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

25

on the 11th of October Uncle Sam awarded to this company a \$3,000,000 contract, a fuse contract to Ajax. By that time Ajax had a throat hold on Time & Micro, they were in there under the security agreement. They had a right to operate the plant, they could buy up to 15 percent of the stock, they could get off the hook anytime they wanted for only \$20,000. They were for all practical purposes Time & Micro. You don't have to go to training in Army contract to know that the United States Government doesn't grant a contract overnight. They take bids and after they take bids they measure which one has the best bid and when they finish with the bids they then do an inspection called a precontract survey and after they do the inspection they then make a contract award and then begins the negotiation of the contract which was introduced by counsel. After the contract was signed and not until then can the contracting party go out and get his subcontractors lined up because you can't make contracts with subcontractors until he knows he has he from the government, he has a prime contract. So you can bet it's pretty safe to assume that in August, since October was the contract signing day, in August that contract award was a reality. We couldn't get Mr. Klein to admit it, he said he didn't know when the award was made. He didn't know when the bids were in. It's a pretty safe assumption for you to

2

3

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

make that in August of 1966, at the end of August, August 25th or so, the contract was in their pocket and at least it was being negotiated and the award was in. There had to be because why in the world did they ask for the quantity of appraisals they did? If they needed it only for a bank, first of all they got four copies of the appraisal when it was sent out at the beginning of August. Jesse Thaler with his transmittal letter enclosed four copies of our detailed appraisal, four copies. Do you think that was enough? No way. In this letter from Mr. Louis that I was reading to you in which he said we would also like for our personal benefit, our own information, what in your opinion the machinery would bring at a forced sale -- by the way, would you also send us four more copies of the appraisal. That is eight formal appraisals. Whom do you think those appraisals went to? I will tell you. They went to the Department of Finance, they went to procurement, they went to the adjunct general, to every department of the government that would require an appraisal to the facility to show that it was a good fine plant worthy of taking a subcontract on the most important element on a piece of armament, a timing mechanism. That is where those appraisals went, eight of them, not a liquidating value appraisal, an in-place appraisal, what they ordered and what they needed and what they were going to use to

demonstrated not only by the letter but by the fact that those additional four appraisals did go out, which they did, because it shows it in the letter transmitted. It's evident from the fact that the loan agreement, the loan agreement, with the so-called -- the so-called loan and security agreement rather, which our friend over here insists was the reason they needed the appraisal, and I may absurd. That very loan and security agreement which is the joint venture agreement doesn't even have the appraisal attached to it, it has the Hirschmann report attached to it. That is Defendant's Exhibit 4 -- Plaintiff's Exhibit 4 in evidence.

what does the plaintiff say? Again I am addressing myself to the breach of contract because that is what we have in this case. What does the plaintiff say? Well, he says not true. Yes, I must admit that the complaint says what it says but it also says that they needed to decide about a loan but you can't get away from the fact that it said that the agreement was that they employed the defendant to do a true market value appraisal. Well, he says maybe so, but Mr. Klein testified, and I dare say he will remind you that Mr. Klein testified that he asked Mr. Thaler over the telephone at one point or another, God knows when, it had to be after the appraisal because he didn't talk to Mr. Thaler before,

1

3

4

5

6

7 8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

he said after the appraisal he asked Mr. Klein for collateral value appraisal, whatever in the world that term means. Not even the world's greatest expert used that term. It's a figment of Mr. Klein's mind.

If he asked for it after the appraisal was rendered then it's simple logic that he asked for something after the contract was made. A contract is a request and an acceptance of request for a consideration and the request is the plaintiff says, "I want a fair market value appraisal." It was accepted by Industrial Plants and eventually paid for. You can't change a contract by something that a man asks for later. It represents an add-on. That is quite true, he may have needed that additional liquidating value figure but not for the Army but for the bank which eventually made a loan to Time & Micro and that is the only reason he could have reeded that liquidating values because only bankers think about disasters and bankrurtcies. Nobody else, certainly not Ajax when it's signed up a \$3,000,000 contract, it has a hook on its own captive subcontractor, working ahead with a potential ten percent profit and don't swallow everything which that most beautiful man, Mr. Sinkler, told you. He is a beautiful guy with a great background and most prestigious record in life. But when he says five percent is all that anyone can expect, don't you believe that because the plaintiff!

25

exhibit or rather Defendant's Exhibit B in evidence indicates. that when Ajax made its first claim to Uncle Sam, its first claim after it was thrown out less than 60 days after the contract was awarded, they filed a claim for \$399,678, \$399,678 of damages which the plaintiff says it suffered because in 30 days it was thrown out of a contract it hadn't even started on. Fart of that was a ten percent profit factor shown on page 2 of the exhibit, ten percent. Schedule D profit, ten percent. Don't take my word for it. it's in the exhibit. I don't know why -- counsel says that this guarantee and this money, this 270 depended so terribly much upon this appraisal. If Alax had received 38 blank sheets of paper from Industrial Plants I wager to say they would have made that loan to put Time & Micro in a position to qualify for a \$3,000,000 contract that meant potentially \$300,000 to Ajax. That is what they put the money in for, 270 was to make Time & Micro ready to take on this contract. The appraisal had nothing to do with it except to convince the Army that Time & Micro was a plant ready to perform with the machinery in-place and qualified to do the job. I will prove it to you by still another way. Perhaps I protest too much but I must cover these things because if I don't my good friend will and you are going to say Mr. Stream didn't mention that, I guess maybe Mr. Brill is right. So I have to cover

the things which I think he is going to cover even if I think it's superfluous.

Remember how everybody said, Mr. Klein and counsel and Mr. Klein in his previous deposition, we were waiting to get the apprais I before we signed this document. Again I repeat to you, they were to sign, not only would they have made the loan, they were to sign this loan and security agreement on August 18th if Thaler had dropped dead on August 15th, they would have signed this loan and security agreement because it didn't cost them anything. They were on the verge of a \$3,000,000 contract.

which means it isn't even their money and that is what happened, they didn't put up the money, they got a bank to do it. From where they stood on August 18th they knew they had a government contract in their pocket, and they did have. They had every reason to believe they would get cash flow or why would they get the 120 day loan and I anked Mr. Klein where is the loan going to be paid from and he said, "Oh, I don't know."

But he knew. The only place that loan was going to be paid by Time & Micro was if the government contracts began to make payments and it was expected to make payments shortly after the contract was signed and the parties figured in 120 days they would be getting from the government to flow through

Ajax and right down to Time & Micro. That is how the loan would be paid off. It didn't cost Ajax anything. They knew they had a contract. They had every reason to believe they were going to get the money from Uncle Sam in cash flow payments monthly plus the fact that they had an opportunity to acquire 51 percent of Time & Micro. They had a right to use the plant for their own purposes in doing this job without rental charge and if worse came to worse they could get out of it on payment of \$20,000. There is a clause in the back which says that if we didn't go ahead with the loan and either lend or get the money that you need we will get off the hook for \$20,000. Use your noodles, ladies and gentlemen. You don't think for a minute that this agreement was signed on the basis of an appraisal that wasn't even attached? Don't leave your common sense at the door.

So Mr. Klein says, "I asked for a collateral value appraisal and I didn't get it and that is a breach of the contract." I have tried to cover with you, ladies and gentlemen, that it just didn't happen that way. He can say it but that doesn't make it gospel fact. This is no germon on the mount. It's a little high chair but use your noodles again. He didn't ask for that. He asked for it after the event, not as a contract but later he asked for collateral value appraisal. Well, he says okay. He says the fact is that

A-1830
SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

3

5

6

8

9

10

11

12

13

14

15

16

17

 \sim

•

0

18

19

20

21

22

23

25

24

we did get, this is alternate argument number two. The plaintiff has come to this court with a whole series of arguments. As you know two of them are out of the case. Even on the breach of contract there is a certain fluidity to the plaintiff's case that is a puzzlement to us. tells you something. He says okay, if we didn't get -- he says first of all we didn't ask for a fair market value appraisal but we got one. Then he says if we didn't get a fair market value appraisal we got liquidaing values. Somehow he wants to get to the jury that he got liquidating value appraisals and he forgets, does Mr. Klein, that his own expert said this is not a liquidating value appraisal, it couldn't ever be a liquidating value appraisal, it's a fair market value appraisal. Counsel has the witness point triumphantly to a telegram and the transmittal letter. You are going to hear the word "inconceivable" but I think you are going to hear it like this -- inconceivable, and let the record show that I really emphasize that word, inconceivable. You are going to remember that word, you watch. You remember how he read to us the paragraph in the transmittal letter, how it is difficult to project market values but it's inconceivable that the value would be less than 60 percent of the appraised figures. And the telegram, listen to this, while -- Plaintiff's Exhibit 30 in evidence, the one he didn't

1

4 5

6

7

9

10

11

12

13

14

16

17

18

19

20

21

22 23

24

25

want to put in and then he did, this is Thaler's telegram. While it is difficult to project market values for the next two years it is inconceivable that the value of this plant, and boy am I emphasizing those words, of this plant, would be less than 60 percent of the appraised figure. That is for the next two years.

Plaintiff says that represented an appraisal of liquidating values, number one. It's not an appraisal, it's a telegram. The letter is not an appraisal, it's a letter. Number 3, neither the letter nor the telegram talks about liquidating values, it talks about something that this man thought in his own wisdom would be an irreduceable figure, a minimum figure of 60 percent of the value he assessed and appraised of the plant. That is market value in-place and that is what the appraisal was. Don't let the wool be pulled over your eyes. Again we are talking abour reliance. telegram that came in, Mr. Klein said he got it on August 16th, August 18th, and that was the day the contract was signed. Reconstruct it for yourself. Just picture yourself. Can you really see a bunch of gentlemen sitting in his home with his plant 20, 30 miles away no further from his home than Chappaqua, a little more than Scarsdale, big deal, a poor closing and they are all sitting there and in Mr. Louis! house and they are waiting for a telegram to come and suddenly

had that deal closed long before they got the appraisal and the telegram didn't get there until after. This telegram which the witness identified bears a California Western Union receipt of August 18th. But again use your own experience, you can brin; your own experiences in the jury room.

What is there in the record that tells you the telegram was delivered at any time on that day? You have no right

> A-1883 SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

9

10

11

15

16

17

18

19

20

21

22

23

24

25

to assume it. I don't know how much experience you have had with Western Union but those of you that have talk about it. Who said it got there on the 18th? The copy which Mr. Thaler sent from New York himself, he didn't get his copy until the 19th. That is why counsel wanted to keep it out. It's time stamped August 19th, Mr. Thaler's time stamp. If he got his copy of the telegram on the 19th why do you assume the other one got there before? If it got there the 19th in California, of course, the whole deal was closed and even if they didn't they weren't waiting for it. The deal was a deal and the appraisal meant nothing. They were reling on a government contract.

Well, says counsel, okay, we got a fair market value appraisal, okay, maybe we didn't get the liquidating value appraisal or the collateral value appraisal but, but — I have another argument says Mr. Klein to his counsel and he stated it here in the courtroom. Ajax got the wrong kind of appraisal, they got the wrong kind of appraisal. Now that, of course, carries that important assumption and that is that Industrial Plants was expected to do something that it wasn't hired to do and that is what counsel is going to spend his time arguing. They knew we needed it to make a loan. Absurd. They didn't know it at all. We knew they were going to assist. We knew they might guarantee. But they asked for

1

7

12 13

14

15

16

17 18

19

20 21

22

23

24

25

a fair market value appraisal. The complaint says that and they acknowledge it in their correspondence and they paid for it. And since, continues counsel, we didn't get -- we got the wrong kind of appraisal they broke their contract with us.

Well, that is not what they said. If Industrial Plants broke its contract by delivering the wrong kird of appraisal and they certainly knew that it was the wrong kind, if it was wrong, putting aside they never said it was wrong, but if they knew it was wrong then they knew they couldn't rely on it and what is their damage? How are they hurt? They hadn't even paid the \$4,000.

> Would your Honor want to take a recess? THE COURT: How much longer will you be? MR. STREAM: Fifteen minutes at the most.

THE COURT: Suppose we go to that extent. would like to make the recess between the two summations.

MR. STREAM: All right.

Let me get down to the last argument that the defendant -- I keep calling him the defendant and that is wrong. He is the plaintiff even though I have carried the cudgels of this case and indeed feel -- I withdraw that statement. I hope that you will conclude that not only has the plaintiff failed to meet his burden but we have taken on a

2

3

4

5

6

7

20

21

22

23

24

25

burden and we have met the burden of proving that there was a contract here and a contract made and kept. So says the plaintiff, there is one more argument I want to make, he says, 'well, okay, you delivered a fair market value appraisal, you can't get away i'rom it, and, okay, that is what we ordered but it was done badly, it was done negligently." I can assure you that is what they are going to argue but that is the only thing left for them to argue. They are going to try to drag the breach of contract, they are going to tell you that not only did we agree to do it, a fair market value appraisal but to do it diligently and according to the highest standards of every industry and profession known to man and we broke them all and they are going to read you from the principles of the American Association of Appraisers and they are going to tell you, he is going to tell you all about this Mr. Sinclair who told you the things that were left out and because those things were left out and the appraisal was done in that fashion he is going to say you have to assume that they broke that contract in that they did not do a careful appraisal. Again, an argument that doesn't hold water.

To begin, with, we demonstrated that Mr.Sinclair never visited the plant and most important, ladies and gentlemen, no matter what he said that appraisal should have the serial numbers and the cross and the manufacturer and the

3

5

0

7

9

10

11

13

14

15

16

17

18

20

21

22

24

25

changed versions and the new models and God knows what else which is a blueprint to heaven and it's a wonderful thing to have, but the one thing he said which is most important is this, he said, "Mr. Stream, you are absolutely right. I can't point to one figure in your appraisal that is wrong." Remember that. "I can't show one figure that is wrong. The only reason I wanted that extra stuff in the appraisal is I wanted your client to know what he was getting." But I said if the client knew that, if he knew from Mr. Haakenson that the machine was in-place, if he knew from Mr. Hirschmann' appraisal two years before that the machinery was the finest precision instrumentation in the country all under one roof from Switzerland, if he knew from the report of Hirschmann what those cost figures were, and that report is before you, it was given to Mr. Thaler by Mr. Klein, and in it it shows values, serial numbers and all the other paraphernalia that was necessary to show that was being appraised, if he knew all that, I said, Mr. Sinclair, what is the harm of leaving it out? Supposing it was done because it wasn't time, wouldn't that be an excuse and he said of course. Remember the exigencie under which this was done, Friday to Monday and counsel is going to tell you what did Mr. Thaler do on Saturday and Sunday, why did he beat it down to Washington and go to the Bureau of Printing and Engraving or wherever he had to go to

25

dig up historical data on this company to add to the vitality of this appraisal and the answer was he didn't need to. The 3 answer was that he had a Hirschmann appraisal there and in any event, ladies and gentlemen, that didn't change or 5 make erroenous the figures. That was the first and most imports thing that Mr. Sinclair said. "I cannot say to you," Mr. 7 Stream, "That the fact that certain features of the appraisal 8 9 differed from the ones I approve of that one figure was wrong," and Mr. Sinkler, the former president of Hamilton said 10 11 the same thing. There is nothing that I can say that is 12 wrong about that appraisal, nothing. Well, says the plaintiff, 13 how about this, the appraisal -- rot the appraisal but the 14 letter which is really not a part of the appraisal but let's 15 assume it was, give him the benefit of the doubt, the 16 appraisal and the telegram talk about Swiss embargos and all 17 that stuff and they are going to show you that after the 18 appraisal was signed the tariffs went down. The Swiss embargo 19 was off but after the appraisal was done in August the 20 tariffs went down. The tariffs went down in January, 1967, cut 21 in half by President Johnson. The appraisal was August. 22 So the fact that the tariff went down meant nothing. 23 Counsel tried to get Mr. Sinkler to say that they were 24 expected, yes, like date and taxes are going to be reduced.

Expected for years but you don't bank on that, you don't live

on expectations. It represented a change in the market but it doesn't matter any more than the Swiss embargo. We were talking about the appraisal of the plant in-place with the finest Swiss machinery known to man. It doesn't matter that others can buy individual pieces because the embargo was off. We were talking about an appraisal value of a plant in-place ready to operate, what Mr. Thaler called turn key, you turn the key and then you go, start off. So much about that

red herring about the Swiss embargo and the tariff business.

Now we come to this question of reliance. I am going to ask you to remember, ladies and gentlemen, that I don't want to sound like a pedant. I am trying my best simply to codify data for you. I recognize you as my peers but I give you these only as suggestions to help you remember things. There is a mnemonic, A.R.D., the issues before you and A. was the agreement. What was the agreement? If there was the agreement I said there was that is the end of the case.

R. is reliance, the reliance factor and D. is damages. Let's talk about reliance. We have covered A. in this word ARD.

Let's talk about reliance. I have already told you how they could not have relied upon the appraisal because it hadn't gotten there when they did the agreement which underlay the whole thing. Recognizing that they say well, we got the appraisal before we actually guaranteed the loan. But by that

jq/lf

1

6

7

10

11

12

13

14

16

17

18

19

20

21

22

23

24

25

time, ladies and gentlemen, they knew that they didn't have the kind of appraisal that would help them determine liquidating values and that is why they wrote these letters, may we also have. They couldn't have relied upon the appraisal and suffered damages because of the appraisal and that is what you have to measure. If they didn't rely upon it then the defendant can't be held liable as his Honor will make abundantly clear to you.

929

And this is absolutely in my respectful -- I can't say that. I dare say you will find this to be the last and irreversibly conclusive point on reliance. Even if there were a niggering remnant of a thought in your mind, just a vestigial remnant that maybe they relied, the bubble bursts when you stop to realize that on August 30th Mr. Kriser at the request of Klein sends an offer to Ajax which is marked in evidence as Plaintiff's Exhibit 9 -- and the plaintiff put this in evidence -- in which he agreed at the request of Ajax to bind his company to pay \$350,000 to Ajax upon call as a purchase price for the machinery at that plant and that he would keep that standby guarantee good for 120 days from the date of his letter which is August 30th. There is that 120 days again and by then Uncle Sam's money would be in again. They wouldn't need the standby guarantee but it's there in case. That is the offer for 5 percent because

A-1890
SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

they had to put the money in; they had to have reserves for that. \$350,000 behind a \$270,000 possible loan. What a beautiful position to be in. As counsel said in his opening statement, maybe we should have taken the guarantee, if we had we wouldn't be in this court. That is most important. He said it. I didn't say it. Maybe we should have taken this guarantee. He said maybe we should have taken the guarantee, if we had we wouldn't be here.

But they didn't take it. Having the opportunity to be whole on that basis and having been offered that guarantee and having requested it how in God's world can any sensible human being stop and say to himself that they relied upon an appraisal of fair market value? You can't do it. Reliance.

Mr. Sinkler testified briefly and said that he was a great expert and then he talked about the Swiss embargo and about what he would do and how no one would pay a premium and he didn't answer that question because he wasn't that kind of expert but he was going to say was who wanted to buy Time & Micro either in-place or unit by unit. I will tell you who, how about Uncle Sam? I said, "Isn't it a fact that you took your plant intact and sold it to the United States Government?" and he said, "Yes." In-place, intact as a fuse operation which was precisely what Time & Micro was not only

7 8

. 16

equipped to do but engaged to do by the United States Government.

So what happened in 1968? We will never know, I dare say, since it doesn't come out so far why the government terminated the contract. You may have some ideas as to it but there is nothing in the record that shows why the government so abruptly changed its find less than two months after it approved the contract leading a filing of a claim of \$390,000 Even Ajax or Industrial Plants, it's own captive subcontractor didn't get a bid from Industrial Plants for December 11th.

By telegram they engaged them as a sub and yet Ajax says it spent \$399,000 and all it got back was \$249,000. It got \$249,000, that it got back.

MR. BRILL: I must object to this.

THE COURT: The jury will determine facts if they are not what the lawyer states, counsel.

MR. STREAM: I suggest the jury bear in mind Exhibit
I in evidence. Exhibit I in evidence which is the termination
settlement contract between Ajax and the United States
Government. Pay particular attention to page 3 thereof.

On damages. I ask you to consider why in a case as important as this was to the plaintiff in 1966 its complaint was barren as we demonstrated of any reference to the United States Government.

*

THE COURT: Speak up a little more.

MR. STREAM: Is barren of any reference to the United States Government. Why it took eliciting by me in cross examination to bring out that Ajax had gotten a United States contract for \$3,000,000, why you had to draw out by admissions of fact that Ajax had been terminated and it received \$249,000 and you go into the jury room and ask yourself what happened to the \$249,000.

MR. BRILL: I must object strenuously to statements of counsel directly in opposition to the perogatives and instructions in chambers this morning as to that sum of money and I request that the Court direct Mr. Stream --

THE COURT: You may disregard that last statement.

MR. BRILL: I apologize for interrupting but I was forced to.

MR. STREAM: Ladies and gentlemen, the rest of this you will have to do by yourself, you have to think it out by yourself. I could dwell almost for two more hours on the detail but I promised you that I would touch simply to remind you to get your thinking process cleared up, to give you a framework in which to think through what you may hear from counsel for the plaintiff. I will reiterate that the issue in this case is did Ajax order and pay for a fair market value appraisal or did they order and pay for a liquidating

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

value appraisal ad I suggest that if you are asked the question
and you say that they didn't order and pay for a liquidating
value appraisal that is the end of the case. I am going to
tell you that. I don't know how you can reach any other
conclusion. There is nothing here to show in any part of
this appraisal liquidating values. Whatever else Ajax may

have asked for is beside the point.

I am going to philosophize with you for a minute. I promise it will only take two minutes but I must do this. I read something in the paper two days ago which I found most appropriate. It was in the morning "Times," your Honor, a matter of public record, October 20th, a headline called "Joan Little's Lawyer Scorns Legal System," and says he bought her acquittal and counsel had the temerity, a member of the bar of which I strive to be an honored member, had the temerity to stand up before a reporter and to say to a reporter in Durham, North Carolina, "A jury is twelve people deciding who has the best lawyer." I call that shocking. It makes the hackles on my neck rise. I think it is an abomination. I beg you not to try the two of us. You have facts enough to reach this case's conclusion in behalf of the defendant without playing mother and father to one lawyer or son or brother to the other or to choose and pick which lawyer is more eloquent, that is bunk. Eloquence may be conviction, nothing more than

25

A-1895

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

taken up by cross examination by the defendant so I don't think

attention during this long trial, and it was a long trial,

but I would point out that at least part of the time was

THE COURT: You don't need to refer to that. He has a right to cross examine and you shouldn't inferentially criticize about him. You may disregard that statement.

MR. BRILL: It's the plaintiff's burden to prove its case, to put in the facts, to prove all the elements of the plaintiff's case and we think that we have done that in the last five or six days and that is what I would like to talk to you about now in the really I say short time which is available to me, although I am sure it seems like a long time to you, but there are a lot of facts in evidence and the best way for me really to sum up is to talk about those facts, to show you what it is those facts proved, what the documents proved, what the testimony proves.

You recall at the very beginning of this case last Tuesday in my opening statement --

THE COURT: That opening statement is not fact, counselor. Get down to the facts of proof.

MR. BRILL: Yes, your Honor. If I may be permitted to proceed --

THE COURT: You may in the correct manner, sir.

MR. BRILL: I outlined to you at that time what it was I intended to prove by the facts I would put in evidence. I said I would show first of all what was the agreement, what was the contract in this case. I said I would show that

there was a contract for the defendant to appraise the machinery and equipment of the Time & Micro Corporation to let the plaintiff know whether that equipment had sufficient value to assure our protection if it had to be sold as collateral on a loan of some \$250,000.

I said that the next issue which I will prove was that the defendant really did not do an independent professional appraisal and I said thirdly that I would show you what would have happened if the defendant had done the appraisal which it agreed and contracted to do.

Mr. Stream has, in his closing remarks, and, unfortunately, I must say this, he had a tendency to skip from one fact to another and oftentimes, perhaps inadvertently only gave you half a fact or half a sentence. Really there is not enough time for me and it's not going to serve our purposes to go through and correct all of those misstatements. But I must say that the first 20 minutes or fifteen or 20 minutes of his summation when he was explaining to the jury, to you, what the plaintiff's claim was and reading from the plaintiff's complaint bears particular mention at this time because as the Court will instruct you the plaintiff's complaint in this case is not simply contained in the initial complaint but it has been amended and elaborated. But even looking to the initial complaint Mr. Stream said to you we didn't say

23

24

25

anything in the initial complaint about a loan or guaranteeing a loan or liquidation of equipment. But the very next sentence from the one he read to you, the very next sentence in our original complaint says that the plaintiff contracted for the appraisal report and the defendant knew why plaintiff required such report, namely that plaintiff would loan \$270,000 to Time & Micro or arrange for such a loan guarantee by plaintiff if and only if an appraisal of the aforesaid machinery and equipment of Time & Micro which was to secure such loan showed a value substantially in excess of the face amount of the loan plus interest and the expenses of liquidation which could reasonably be anticipated. Thus removing any substantial risk to plaintiff in making or guaranteeing such loan. That is what this case was originally about. That is what this case has always been about and that is what this case is about now and that is what you have to determine.

There have been other efforts which I must character!?

as not so much a statement of the facts but an effort to

confuse the jury in some way --

THE COURT: You may disregard that statement, members of the jury.

MR. STREAM: I wish counsel wouldn't do that.

MR. BRILL: I will talk about those in detail.

THE COURT: What you state about confusing is improper

and I have asked them to disregard and I repeat that.

MR. BRILL: All I am asking you to do really is look at the simple facts of this case. It really is a simple case. I must say that. The essential elements of this case despite all the testimony which you have heard are proved largely through the deposition, through this deposition of Mr. Jesse Thaler, of the appraiser of the defendant. Remember the long day we spent reading to you from that deposition. Mr. Thaler said in that deposition that he didn't dispute that he was asked to do an independent professional appraisal. He didn't dispute that he knew the purpose of the appraisal. He didn't dispute, despite what Mr. Stream says to you now, he didn't dispute that he knew in 1966 that Ajax was going to rely on the appraisal and he didn't dispute really that he did not do any independent and professional appraisal of his own. Those are the facts which matter to this case.

I would like to begin, as Mr. Stream did, with a discussion --

MR. STREAM: I wish your Honor would direct counsel to stop referring to me and my summation. That is improper and counsel knows that.

THE COURT: Yes, it's unnecessary. Counsel should disregard it.

MR. BRILL: I would like to begin by directing your

August 12, 1966. This is when the oral agreement for an appraisal was entered into, the crucial underlying contract in this case. I am not going to read to you at this point from Mr. Klein's testimony but I will summarize it for you and if you have any doubts as to what he testified to, the Court will instruct you that you can have any of the testimony or any of the depositions read to you.

THE COURT: Yes, under certain circumstances.

MR. BRILL: Mr. Klein testified, and I made notes from the written transcript of his testimony, that he told Mr. Thaler that Ajax was contemplating either advancing money or guaranteeing a loan for Time & Micro and that he told Mr. Thaler that Ajax wanted to know the forced liquidation value of this equipment in case there was a default on the loan and the equipment had to be sold. You remember he also testified that he told Mr. Thaler he wanted an itemized appraisal of each piece of machinery or each piece of equipment and not an appraisal of the entire unit value as a watch manufacturing plant and that he told Mr. Thaler he wanted two types of value, primarily the forced sale value but also a replacement value or replacement cost for this machinery.

What did Mr. Thaler testify to in his deposition?

Really no dispute on this point --

21

22

23

24

25

difficult to project the market values of used machinery for the next two years. However, it is inconceivable that the value would be less than 60 percent of the appraised figures that we have established. Comepare this carefully considered language to the language in the telegram using the shorthand word "plant" and ask yourself how would you as a reasonable person, as a businessman receiving this letter talking about values of used machinery and less than 60 percent of the appraised figures have interpreted that, would you have interpreted that as a total in-place value of a going plant? You remember we read to you also from another paragraph in the same letter that manufacturers utilizing most modern high precision equipment of this nature would pay premiums over and above the values as established in our appraisal of this equipment if it were made available to them. I did emphasize the plural because the plural was used by the defendant. Not a single manufacturer paying a premium for a single plant but manufacturers paying premiums for pieces of machinery.

This wasn't a hasty appraisal and incidentally I say, as Mr. Klein testified, these two documents were what we considered to be the formal appraisal report. Mr. Stream may say to you that this is the appraisal and hide this but this is what told us what the values were.

A-1901

22 23

MR. STREAM: That is another improper comment and that is the last one I will stand for.

THE COURT: Yes, disregard it.

MR. BRILL: The defendant may wish you to understand and only to look at this one document, Plaintiff's Exhibit 6, to see what its appraisal was but I suggest to you that we were entitled and indeed we did look at this letter as well, the letter which told us --

MR. STREAM: I object to counsel becoming a party in a summation by referring to himself as "we."

THE COURT: Yes, that is improper, counsel.

MR. BRILL: Obviously I am referring to the plaintiff.

THE COURT: Well, say so.

MR. STREAM: You may not identify yourself to the plaintiff that way. You know that, Eddie, don't do that.

MR. BRILL: How about the key letter in August, 1966.

from Mr. Loui to Mr. Thaler. The appraisal was received
on August 22, 1968, mailed out on Augus 9th. On August
23rd, the very next day, Mr. Louis sits down and writes to
Mr. Thaler and you read this letter for yourself and you see
is he thanking Mr. Thaler for this appraisal and saying yes,
you did a wonderful job, thank you very much, he is saying
Time & Micro is anxious to come to a preliminary understanding
at an early date. Since we had to have some basis upon which

'made by our Mr. Jesse Thaler, giving you certain loan officers and banks so that you may verify the authenticity and reliability of our appraisal figures and to assure you that the appraisal is a solid and scientific evaluation of the assets in question." That was the information which we got. That was the information which we got. That was the information which plaintiff received, I apologize, your Honor, it's a slip of the tongue --

THE COURT: Don't slip again then.

MR. BRILL: Which plaintiff received between August
15th and the time when Ajax finally committed itself to
guarantee the loan for Time & Micro.

That is what we received.

MR. STREAM: That is what your client received.

MR. BRILL: That is what Ajax received.

THE COURT: I want you to stop that "we" business.

It has certain connotations which should not be expressed.

MR. BRILL: I am attempting to, your Honor. I would like to address the next question which is the question of reliance. Did Ajax rely on Industrial Plants' appraisal?

Of course Ajax relied on Industrial Plants' appraisal.

where counsel says of course Ajax did or did not. He can simply say to the jury that I suggest to you that Ajax did and not make himself a party.

THE COURT: Disregard the form in which the last statement was made and would you please abide by this.

MR. BRILL: The issue is so simple because Mr.

Thaler knew in 1966 that Ajax was going to rely on his appraisal and he testified that he knew that Ajax was waiting for the results of the appraisal and that Ajax would rely upon the appraisal in the course of dealings wit. Time & Micro and he testified that Klei told him that it was necessary to have this appraisal evaluation soon because it was necessary for Ajax to conduct whatever else Ajax had to conduct, this is Mr. Thaler's testimony, after Ajax received this appraisal which Mr. Thaler says he presumed was in connection with making a loan. That is what he presumed. That is what Mr.

Thaler thought back in August of 1966.

I suggest to you that upon Mr. Thaler's knowledge, u on Mr. Thaler's testimony the case which the defendant tries to make out that we didn't rely on it --

THE COURT: Again you say we. Can't you correct yourself?

MR. BRILL: I am attempting to. You haven't succeeded very well.

MR. BRILL: No, I haven't.

That Ajax could not rely on the appraisal and did not rely on the appraisal really doesn't withstand examination.

fair market value in-place and liquidation value, just the way Mr. Klein said, incidentally, he expected to receive his appraisal with two columns of values and why the assumptions and limiting conditions were not in Defendant's Exhibit J, the limiting conditions which Mr. Sinclair testified every professional appraisal ought to have, and why the statement of purpose and the definition of liquidation value in page 4 and the interruption was somehow not contained in Defendant's Exhibit J supplied to you. Compare these two exhibits if you have the opportunity. Compare what Mr. Sinclair offers as an example of a professional, complete appraisal, and what the defendant suggests to you by offering to Mr. Sinclair on the witness stand certain excerpts from that appraisal and consider what was omitted by someone from Defendant's Exhibit J.

MR. STREAM: That is most improper.

THE COURT: Disregard the latter statement, it's not applicable. There is no sense in it.

MR. BRILL: What if Industrial Plants Corporation had done a true appraisal? The defendant says there is no evidence that any one single value is wrong, but the evidence is there. It's up to you to connect it and to put it together because Mr. Sinclair testifying as to the ordinary standards of appraisal practice testified that it is a must that a professional appraiser investigate to see whether there is any

A-1905
SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

1

3

5

6 7

9

10

11 12

13

14

15

16

17

18

19 20

21

22

23 24

25

ing on the loan, the guarantee we entered into, because of, in reliance of defendant's appraisal.

Also with respect to damages, there has been thrown before you in this case numbers like \$249,000 Ajax received money back from the government in termination of the fuse contract. The Court will instruct you as to the relevance of those figures in this case and what it is you have to determine with respect to these termination claims. I do want to point out to you that Ajax did make claims to the government for losses and expenses caused because of the termination of that fuse contract as the government allowed it to do and as the government did pay back certain of those expenses two years later. We say that those repayments have nothing to do with this case. They were based on losses and expenses which are specified and submitted in the claimed documents in evidence and you will see that we did not claim and we did not receive any reimbursement for our loss on this loan guarantee.

There is a quest'on before you of \$20,000, \$20,000 which Ajax received on behalf of Time & Micro payment from the government made to Ajax as the prime contractor for Time & Micro's own losses on this fuse contract and the defendant claims that that \$20,000 -- if you first find the plaintiff was damaged that you must next determine whether or not that

AFTERNOON SESSION

2:30 p.m.

(Court Exhibit 5 marked)

(In open court - jury present)

of the jury, I am about to charge the instructions which will aid you in determining your verdict. If I am not heard by you at any time by any one of the eight now in the box, please raise your hand and if I don't seem to see it wave your hand around and I will ask the Clerk to tell me. I shall endeavor to avoid lowering my voice beyond what you can hear.

You are obviously now about to enter upon your final function as jurors and decide the facts in this case. You, of course, as I have said before, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, the credibility of the witnesses and you determine the reasonable inferences to be drawn from any conflicting evidence which may be in this case. It is my duty at this time to instruct you as to the law and it is your duty to accept these instructions as to the law and to apply them to the facts as found by you in the course of your deliberations.

Now in your determination of the facts you rely solely upon your own recollection of the evidence. What I have said from time to time and what I may say in this charge

O xxx

6

4

5

8

7

9

,10

11 -

13

14

15

16

17

18

19

20

21

22

23

24

25

or what counsel may have said during the course of the trial or during their summations is not to be taken by you in place of your own recollection of the facts or the evidence in this case. No comments by counsel or by the court are evidence. You are to draw no inferences therefrom. During the course of this trial I have been forced to pass upon questions concerning the admissibility of evidence. You are to draw no inferences from the Court's rulings with respect to the admission or rejection of evidence. These rulings relate solely to questions of law and are not to concern you as the triers of the facts.

Meither are you to be concerned by questions that may have been asked by the Court or that the Court asked questions. These questions were asked by me solely to elicit or clarify facts at issue. Nothing that the Court said is to be considered or construed to indicate what your determination should be, except, of course, that I expect you to follow these instructions. You must completely ignore answers by witnesses made either voluntarily or in response to a question when such answers have been stricken. Then they form no part of the evidence in the case and may not be considered by you in determining your verdict. The evidence comes from the testimony of witnesses on the stand, from depositions or portions thereof read into evidence and from various exhibits

1.

11 ·

which are admitted into evidence, and in one or two instances stipulations of counsel with respect to certain facts.

Now you obviously are to approach your duties cooly and calmly without any emotion. Both direct, I charge you, and cross examination must be considered by you. You may draw certain inferences from testimony or from exhibits but you are not permitted to draw inferences from other inferences. No verdict is to be based upon speculation or conjecture.

In this case it is possibly apparent that there has been both direct and circumstantial evidence. Direct evidence is where a witness wno saw the commission of an act testify as to what he saw, what he heard or what he discovered about it or knows of his own knowledge something that comes to him by virtue of his senses. Circumstantial evidence, on the other hand, is that evidence which tends to prove a fact in issue by proof of other facts or a chain of other facts which have a legitimate tendency to lead the mind to a conclusion that the facts exist which are sought to be established. Now the law makes no distinction generally between the weight to be given to either direct or circumstantial evidence. Both direct and circumstantial evidence must be considered by you in determining your verdict but always in accordance with all of the instructions which I give you.

We begin here with the prime and fundamental proposi-

tion, that the plaintiff, having made these claims, has the burden of proving the material allegations of its complaint by a fair preponderance of the credible or believable evidence. This term "fair preponderance of the credible evidence" means the great weight of the evidence. It refers to the quality of the evidence rather than the number of witnesses. It means that the testimony on the part of the party on whom the burden rests must have more convincing weight than that opposed to it. You may say that a fact was proved by a fair preponderance of the credible evidence when all of the credible evidence tends to persuade you to believe what the witness or witnesses have said or what the proof shows as against other testimony or proof that may have come into the case.

The defendant, I charge you, has no obligation to come forward with any evidence or to disprove anything.

Whether the defendant produces evidence or not, the fact remains that the defendant here is entitled to a verdict in its favor if the plaintiff fails to sustain its burden of proof.

Now the parties. Plaintiff in this action, of course, is Ajax Hardware Corporation. The plaintiff is represented by Mr. Edward Brill here. The defendant is, of course, the Industrial Plants Corporation which is represented by Mr. Arnold Stream. Both of these parties are corporations. Obviously a corporation can act only through its officers,

1

6

8

7

10

12

15

14

16

17

18

20

21

22 23

24

25

employees of other agents. Therefore, any act or omission by an agent or employee of the corporation, if done within the scope of his employment, is held in law to be the act of the corporation he represents and it is bound by his acts.

Now I try to summarize the plaintiff's contentions. The plaintiff contends here, and mind you that a contention is not among, it is merely, in effect, a claim, that it engaged the defendant which represented itself to be expert in the appraisal of industrial machinery and equipment, to make a true and accurate appraisal of machinery and equipment located at the Time & Micro plant in Strasburg, Pennsylvania. Plaintiff contends that it told defendant that it was considering entering into a loan agreement of this machinery and equipment and if the machinery and equipment would be adequate security for the loan. Plaintiff in its complaint contends that on August 12, 1966, it informed the defendant that it wanted to know specifically whether this machinery would realize at least 270,000 at a forced sale. This is plaintiff's contention to provide adequate security for the proposed loan. Plaintiff also contends that it told defendant to make an independent appraisal as to the value of such items of machinery and equipment and that it needed the appraisal very quickly, in fact by the following Monday I think it was, but that it

20

21

22

23

24

25

would await this appraisal before entering into the loan guarantee. Plaintiff also contends that the defendant inspected the machinery and equipment on August 15, 1966, that the defendant called by telephone as to the amount of the appraisal and also sent a telegram, Plaintiff's Exhibit 3, giving a preliminary appraisal figure. Also there is a contention that on the 18th the plaintiff entered into the loan agreement, the loan and security agreement, with Time & Micro, Plaintiff's Exhibit 4, I believe. And that on August 19th plaintiff received defendant's formal detailed report in writing, Plaintiff's Exhibit 6. Plaintiff further states that pursuant to the loan and security agreement entered into with Time & Micro on August 18th plaintiff entered into an agreement guaranteeing a bank loan as heretofore claimed and that Time & Micro defaulted on the loan, that the plaintiff was, therefore, obliged to pay the remainder due after an auction sale of the machinery and equipment which was collateral for the loan.

There is also a contention that the defendant inspected the machinery and equipment on August 15, '66, and called by telephone as to the amount of the appraisal and also sent a telegram giving the preliminary appraisal figure and that on August 18, '66, plaintiff entered into this loan and security agreement and that on August 19th plaintiff received

defendant's formal detailed appraisal report in writing,
Plaintiff's Exhibit 6. Further that Time & Micro defaulted
on this bank loan agreement. Plaintiff was obligated to pay
the remainder due off an auction sale of the machinery and
equipment which was the collateral for the loan. And that
because of the foregoing facts the defendant breached the
contract entered into between the parties on August 12, 1966,
in that defendant failed to make an appropriate appraisal and
that as a result of this alleged breach by the plaintiff
plaintiff sustained a pecuniary loss in reliance upon the
defendant's appraisal.

What I have recited so far is merely the claim of the plaintiff This claim, as I stated to you before, must be sustained by the evidence and by a fair preporderance of the credible evidence. Now, on the other hand, the defense contends that the plaintiff engaged the defendant to make a fair market value appraisal of Time & Micro plant as an entire plant, intact and ready for operation and denies that plaintiff requested it to appraise what value each item of machinery would realize at a forced sale.

The defendant also contends that the plaintiff arranged to have a Mr. Haakenson, an employee of the plaintiff, who was familiar with the Micro plant company, and aid the

Ø.

defendant in examining the machinery and that the plaintiff, Ajax, told defendant to rely on the facts contained in an earlier appraisal which had been made by a Swiss company, and on the facts related to it by Mr. Haakenson, and that the defendant was requested to update the earlier appraisal.

Defendant contends that this was done in order to save time in that the plaintiff wanted his appraisal, as I said, the next Monday morning.

The defendant further contends that the plaintiff did not ask for the forced sale who of the machinery and equipment until a greatly later date and so, says the defendant, it provided the type of appraisal which plaintiff requested and it did not breach the contract. Furthermore, the defendant contends that the plaintiff did not rely on the appraisal but relied instead on the fuse contract with the United States Government which it had entered into, that is relied when the plaintiff entered into this ban agreement, loan or guarantee agreement, and that plaintiff entered into this agreement subsequent to the time or before, rather, it had received the telegram appraisal.

Plaintiff, as I have already stated, asserts that the defendant breached the contract. Now if the plaintiff proves this claim of breach of contract the defendant would be liable for any resulting damages proximately caused by the

find it.

_

11 .

Now what is a contract? The contract, of course, is simply an agreement between the parties to do or not to do certain things. Here it's a so-called oral agreement. For good or for evil, that is all the contract was and it has to be proved even if it is oral. It must be proved by a fair preponderance of the credible evidence.

alleged breach or the breach which you may find, if you do

In this case the alleged agreement concerned the obligation of defendant to provide plaintiff with an appraisal of certain equipment and machinery located at the plant of Time & Micro. In order for the plaintiff to recover in this action under the theory of breach of contract plaintiff must prove by a fair preponderance of the credible evidence as follows: first, the formulation of an oral contract between the plaintiff and defendant. This includes, of course, the burden of proving the terms of the contract. Second, the plaintiff must prove that defendant failed to perform its obligation under the terms of the contract and, third, the plaintiff must prove that it was damaged thereby and what those damages were.

The terms of the alleged agreement consistently are at issue. It is for you to determine from the evidence you have heard what the terms of the agreement were as made

1

4

6

7

8

9

10

12

13

14

15

16

17

18

19

21

20

22

23

25

amount that could be realized from the sale of individua. items of machinery and equipment at the Time & Micro plant under the conditions of a forced sale or liquidation sale. In determining what these terms were you must consider the plain, everyday common sense meaning of any words employed by the parties as these officers, that is by Klein and Thaler, when they entered into, if they did enter into, the alleged agreement on August 12, 1966. Secondly, you must consider whether the defendant agreed to make an independent appraisal for the plaintiff relying on its own skill, knowledge and experience or did plaintiff tell defendant to rely on the Hirschmann report and any statements made by Haakenson in connection with the appraisal. If you find that the defendant did not fully comply with the terms of this agreement as you determine them to be, then defendant would have breached the contract. If you find that the defendant did fully comply with the terms of this agreement as you determine them, then the defendant did not breach the contract.

on or about August 12, 1966, between plaintiff and defendant.

In other words, did the defendant agree to appraise the dollar

If you find that the plaintiff asked for a fair market value appraisal only and that defendant delivered a fair market value appraisal, then you must find for the defendant as to the question of breach of contract. The evidence

completely different from an appraisal of liquidating values or at a forced sale. Therefore, a fair market value appraisal could not be used or relied upon in connection with any forced liquidation sale. If you find that the plaintiff asked for a forced liquidation sale appraisal but received instead some other type of appraisal then you may find that the defendant breached the contract. If you find that the plaintiff asked for and received a forced sale liquidation sale value, then you will consider whether or not this contract was breached by any failure of the defendant to prepare the appraisal with care, skill and accuracy reasonably to be expected under the circumstances, mindful of the exigencies reflected by the evidence as to the time as of which the plaintiff requested the appraisal.

clearly shows that an appraisal for fair market value is

When an oral contract is disputed the evidence of the statements of the parties and instructions from a plaintiff must be considered in determining the terms. Any subsequent statements made Gally or in writing are not determinative of the terms of the contract entered into allegedly on August 12, 1966. Although the alleged contract clearly was only oral it is the obligation of the plaintiff to prove the terms thereof by a fair preponderance of the credible evidence. Any appraiser, I charge you, by virtue of his position as an

14

15

16

17

18

19

20

21

22

23

24

25

expert in the field of appraisal and his contract of employment is expected to exercise the care and competent responsibility expected of persons in his profession in the performance of the contract under the terms and conditions thereof. He must adhere generally to accepted professional standards in carrying out his duties under this contract. The services of an expert are sought because of their special skill. If he fails to perform in accordance with these standards he may be liable for breach. He must perform the thing agreed to be done with the care, skill and faithfulness required under the entire circumstances of the contract and a willful or negligent failure to do so might be a breach of contract.

However, the conduct of an appraiser may be in light of all of the circumstances. This means that you are to consider the on itions under which the appraisal was actually made including any instructions given by the plaintiff to the derendant. You must also consider the plaintiff's requests that the defendant perform the appraisal as soon as possible or I believe it was on the following Monday, and the alleged instruction of the plaintiff that defendant was to rely on the earlier appraisal which plaintiff gave the defendant and on the advice of plaintiff's employee, Haakenson.

However, those that hire such persons are not justified in expecting infallibility. They expect only reasonable

jq/lf 988

care and competency comparable to that of others in the profess'on. Those sections of this code of practice and ethics for appraisers which were read to you are not binding on you but may be considered by you in determining whether adequate professional standards were used under the terms of the plaintiff's request in making the appraisal and plaintiff's instructions as you may conclude those to have been.

However, there is no absolute requirement to comply with any of these standards and failure to comply thereto does not necessarily mean that the values reported in the appraisal are incorrect. Another factor for your consideration is that at the very best an appraisal is nothing more than an estimate representing the best opinion of the appraiser. An appraiser cannot be held liable for an error in his opinion as to value if it is based upon reasonable ground for belief as to its accuracy.

In mind that even if you find the defendant breached its agreement either by failure to provide the type of appraisal agreed upon or by negligently performing the appraisal, as hereinbefore stated, a plaintiff may still not recover unless it has proved by a fair preponderance of the credible evidence that it relied upon the appraisal to its damages. In other words, the plaintiff must prove that the injury which it

23

21

22

25

this part of the case plaintiff must in the first instance prove his damages by a fair preponderance of the credible evidence and must establish the nature, extent and effect of such damages. The defendant must respond to all damages which flow from and are in the natural consequence of the alleged breach as measured by common experience in the usual course of events. But these damages cannot be remote, they cannot be speculative, they cannot be conjectural. Your verdict must be based upon the facts of the case determined without bias or prejudice in any respect. Moreover, in assessing damages you must take into consideration that every party suing to recover damages which it claims were caused by another is under the legal duty to keep all of these damages down to a reasonable minimum. That is known in law as mitigation of damages. The burden of showing that a plaintiff could have reduced or limited his damages in any given way is upon defendants. This, however, does not alter the fact that the plaintiff must assume the burden in the first instance of proving his damages by a fair preponderance of the credible evidence and this means that the plaintiff must establish the nature, the extent, and the effect of the damages he claims to have suffered.

Here the plaintiff is seeking compensatory damages and compensatory damages are only given to recompense for a

loss or injury. It the only kind of damages sought here.

I am going to take a short recess at this time.

can split my charge up a little more than we did with the

lawyers this morning.

(Jury left the courtroom)

(Recess)

THE COURT: I shall resume, I trust, where I left off. I may repeat perhaps.

If you find that the defendant entered into a contract as claimed and breached its contract with plaintiff, then plaintiff should be awarded those compensatory damages that are the natural and probable consequences of the breach in the ordinary course of events which would likely result from this breach and which could reasonably have been foreseen as contemplated by the parties when the contract was made.

If you find that the plaintiff was entitled to compensatory damages you cannot exceed the total sum claimed for such damages which is 161,895. Defendant contends that plaintiff's loss, if any, was reduced by recovery from the government when the government terminated the fuse contract. Plaintiff contends that this more y did not cover losses under the security and loan agreement with Time & Micro but rather covered losses suffered by plaintiff and subcontractors because of the government's termination of the fuse contract. If you

A-1921

find that the plaintiff is entitled to damages and if you also find that the loss suffered by the plaintiff under the security loan agreement was reduced by any recovery as stated from the government, then you must take this into account to the extent of \$20,000 in reaching your verdict as to damages.

I believe I stated that if there is proof of plaintiff's damages and of reliance on the appraisal by the defendant in the signing of the contract by the bank, with the bank by the plaintiff, then it is appropriate to allow plaintiff a verdict of 141,895, in substance as I have stated.

Now I come after these general instructions as to the applicable law to a consideration of some of the facts in this case. Please bear in mind, however, members of the jury that this is only my recollection. What I may say or what counsel may have said is not to be taken in place of your own recollection of the facts or the evidence in this case. It is your duty, members of the jury, to consider all of the evidence in this case, that is all of the testimony given, both direct and cross examination. The fact that I may avert to certain testimony and may not refer to other testimony does not mean that any testimony or evidence whatsoever should be disregarded.

I shall not attempt, ladies and gentlemen, to review the respective claims of the plaintiffs and the defendants asserted in their summations today. You heard them only recently

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

this morning. I shall have to rely upon you to do that.

I want to give you, and I want to put it in close juxtaposition, the respective claims with respect to the contract conversations on the first day when the parties met. Klein testified for the plaintiff. He was employed by Ajax from '61 through '68 as executive vice president responsible for everyday operations and responsible for seeking new business. I don't know whether this was everyday operation or whether it was even a new business opportunity for Ajax. Klein stated that in 1966 Ajax began competing for military contracts. He stated, and here I come to the juxtaposition of what the plaintiff says and I will let him follow it by what the defendant says, Klein stated that on August 12, 1966, he met Jesse Thaler in the New York office of Time & Micro. He said that he told Thaler that Ajax wanted defendant to perform an appraisal of the Time & Micro plant and that the purpose of the appraisal was that Ajax was contemplating either a direct loan or a guarantee of the loan to Time & Micro and that Ajax wanted to know the forced liquidation value of the machinery and equipment in the Time & Micro plant and also requested the replacement value of the same. Klein testified that he told Thaler that Ajax was competing for a government contract and if it got it Ajax would either subcontract with Time & Micro or enter into a joint venture with Time & Micro.

A-1923

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE FOLEY SQUARE. NEW YORK, N.Y. - 791-1020

He said he told Thaler that Ajax did not have any knowledge of the machinery and equipment and in reply to Klein's question Thaler said that defendant had such experience, mentioning Fairchild Instruments as a company for which Thaler had made an appraisal. Klein said that Thaler agreed to perform such appraisal. Klein testified that he gave Thaler a copy of the Hirschmann appraisal which had been performed for Time & Micro in 1964 and told Thaler that he could use this appraisal as an inventory list but should not use the values thereon but to give his own values. Klein told Thaler that one Harry Haakenson, an employee of Ajax, would accompany Thaler during the appraisal to show Thaler where the machinery and equipment were located. Then I turn to a subsequent page here in which the relevant testimony of the defendant was on.

This is from the deposition of Thaler as read. In 1966 Mr. Thaler was vice president of the defendant corporation, that is Industrial. He stated that he had been in the machine and industrial equipment business specializing in appraisal of such equipment. He testified that he met Klein for the first time on August 12, 1966, in the New York office of Shriro. He stated, that is Thaler, that Mr. Klein gave him the Hirschmann report at this meeting and that Klein asked him to give an appraisal as to his judgment of what the machinery and equipment in the Time & Micro plant was worth.

He said that the reason that Klein told him he gave him the Hirschmann papers was that he could have a list of the equipment which he was to appraise.

3

5

7

9

10

11 -

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Thaler also testified that Klein told him that he wanted this report in connection with some financing which would involve the equipment as collaeral. He stated that Klein asked him for his best judgment regardless of the Hirschmann appraisal. The appraisal was made though, Thaler said, on Friday, the 15th of August. In making the appraisal Thaler said he used the Hirschmann report and had a pad and pencil to record his notes with respect to each machine. He testified that he viewed the machines to determine the condition of each referring to the original cost of each machine, in addition considering the approximate age, that he would determine the then present value as against the value on the Hirschmann report. He said he did not operate the machines. He said that he did not consult to anyone or refer to any other source of information in making the appraisal. He was accompanied by Mr. Haakenson, an employee during the appraisal. He further stated that Haakenson advised him of the difficulties in obtaining this type of equipment from Switzerland because there was a syndicate which controlled the importation of this equipment into the United States and that delivery schedules were between two and three years behindhand. He did not know

jq/1f

11 .

this of his own knowledge. He stated the precision machinery was very difficult to come by, especially new machinery.

He said that manufacturers in this country could pay important premiums over and above the values as established and his appraisal was based on the fact that there was a complete unit, that the Time & Micro plant was a complete unit for the manufacture of precision instruments. He said that he had never told anyone that part of the basis of his appraisal was in reliance upon consultations with Mr. Haakenson.

I return to the testimony of Klein. On August 16th, according to Klein, Thaler called him and said that the high side appraisal value was some \$900,000 and that the forced liquidation, I believe he said, was approximately \$500,000. That is Klein now, not Thaler.

Klein said he asked Thalor to submit the appraisal in writing and Thalor said he would send a telegram. Klein stated that he received a telegram, Plaintiff's Exhibit 3, on August 16, '66. That after receipt of this telegram Ajax signed the agreement with Time & Micro, Exhibit 4, I believe. to guarantee a \$270,000 loan. He signed the loan agreement only on the basis of information contained in the telegram. You will recall that the defendant claimed that this was done, that is the signing of the loan agreement was done before the receipt of the telegram. There was some detailed testimony about

that to and fro.

2

1

6

7

8

10

11 .

12

13

14

15

16

17

18

19

20

21

22

23

24

25

According to Klein he had some further subsequent communications with Kriser of Industrial. The substance of these communications, according to Klein was that Ajax complained that it was not sure that what it would receive from defendant was exactly what it had asked for. This, of course, was after the original date when the claim of contract being made had passed.

In response to this complaint of the plaintiff, defendant asserted that it had supplied the type appraisal agreed upon and that it was willing to sell to plaintiff a buy-back agreement. You will recall about that. I don't think I need to go over it. Ajax, of course, did not take advantage of the buy-back agreement, according to Klein.

Then there was a note signed by Time & Micro for \$270,000. Later there was a sale. Cross examination of Klein, he testified that he was no longer interested in any way in Ajax. He stated that he left Ajax in March of '68. According to Klein his boss at Ajax was Norman Louis, president, who was reponsible for the overall financial management of . marketing strategy of Ajax. He said that Ajax was not geared for the manufacture of precision instruments but was gearing up to make fuses. He said that his first contact with Time & Micro was a meeting with Mr. Jacpb Shriro, president of Time

D

)

& Micro, who had the controlling shares.

At this time he told Shriro that Ajax was bidding for a fuse contract with the government and wanted Time & Micro to make the timing mechanism. I don't know that there is anything material further in that area.

Klein stated that he had a number of meetings with Shriro and that during one of these meetings he was given the Hirschmann appraisal and he said that he had asked for this report to use as an inventory to match against what Ajax had determined would be necessary to manufacture the reded timing devices.

There was some further testimony about arranging a meetin; with Thaler to occur in New York City on Friday, August 12th and at that meeting there was further conversation as heretofore related.

Klein conceded that Haakenson, who accompanied Thaler on his inspection tour of Time & Micro, knew what type of equipment was at the Micro plant and knew how it could be used in manufacturing timing mechanisms and also was aware of the status of the fuse contract at the time of this inspection.

When questioned about the telegram from Thaler which Klein allegedly received on August 18, '66, Klein conceded that there was no receiptdate stamped thereon.

A-1928

11 -

when Klein was questioned about the security and loan agreement with Time & Micro, E hibit 4, K'ain stated that he didn't know when it was prepared except that it was prepared prior to August 18, '66.

Klein acknowledged that the formal appraisal was not received by Ajax until I think it was August 22, 1966, and neither he nor Louis wrote to Klein about getting the appraisal.

He was questioned about this proposed stand about the buy-back agreement. I don't know that I need to speak further about this. He also conceded that the government contract was signed on October 19, 1966, and until that date, according to the terms of the security and loan agreement, Ajax could still have backed down on the said agreement at a cost to Ajax of \$20,000 liquidating damages.

Cross examination of Klein continued, he stated that he did not know if Ajax had disclosed any information about the fuse contract to the lending bank, that there was no formal contract between Ajax and Time & Micro as a subcontractor, that the reason for the government's termination of the fuse contract on December 30, '66, was because of a reduction and requirements for fuses. On redirect examination Klein explained that he talked by telephone on August 18, '66, and told Louis that he had received the telegram, Plaintiff's

1 | jq/lf | 1000

Exhibit 3, which confirmed the prior verbally reported figures and he told Louis that he could execute the security and loan agreement. According to Klein this agreement was then executed at Louis' home. Klein testified that Ajax I d the capability of making most of the components for the fuse in '66 and that the timing device represented ten to fifteen percent of the value of the fuse.

Now I come to Sinclair's test'mony. He testified for the plaintiff he is president of the Keystone Appraisal Company of Philadelphia whose business is the appraisal of industrial and commercial properties in both the field of real estate and machinery and equipment. He is a senior member of the American Society of Appraisers. He stated that his specialty was the evaluation of machinery and equipment and that he had been an appraiser for some 25 years. You will recall that he was questioned about certain sections from this code of practice in ethics and so forth. This code is a set of guidelines promulgated by the society and may be considered by you only in that context, specifically he was asked whether certain aspects of defendant's appraisal were in conformity with that, that is, with those principles.

He further testified as to how an appraisal should be done, in his opinion what should be taken into consideration and what should be included. He stated that an appraiser should

1

3

5

6

7

a

10

11 -

12

14

15

16

17

18

19

20

21

22

23

24

25

properly consider the marketability of the items and if he uses any other information, and so forth, he should state the same.

He was asked a number of hypothetical questions based upon certain assumed facts at issue and was asked to state whether or not an appraisal under these assumed facts conformed to the standard of practice. I believe I have already charged you as to the significance.

On cross examination Mr. Sinclair testified that he had never purchased and had never brokered a sale of machinery or equipment. He stated that there were many appraise who do not belong to this American Society of Appraisers. conceded that Industrial Plants is a reputable appraising company and that Jesse Thaler, the senior vice president of Industrial Plants, was a senior member of the American Society of Appraisers, and he conceded that he himself had never appraised any watchmaking equipment. He was questioned about a certain appraisal which he had made, Defendant's Exhibit J-1. He conceded that on this appraisal not all the items were identified by trial numbers and so forth. This was later amplified by an exhibit which contained apparently the full appraisal. He was asked a hypothetical question based upon assumed facts and he answered that under the assumed facts the appraisal could not have been made which completely conformed

11 .

to the standard practices of professional appraisal procedures, although based upon the assumed facts it would not have been wrong for an appraiser to accept that assignment. He conceded that because of exigencies some of these standards had to be omitted.

Thaler's deposition was read in part. In 1966 -- and I think I already read this to you and I shall not reread. This was mainly, if not entirely, relating to what took place on the initial conference between Thaler and Klein.

He stated -- this may be repetitious but I shall read it. He stated that all of the equipment which he appraised was listed for auction and was in the same condition on the day of auction as it had been when he appraised it. He also testified that to the best of his knowledge no one at Industrial Plants ever put a liquidation value on the machinery and equipment of Time & Micro and to the best of his knowledge no one at Industrial Plants had ever spoken to Mr. Kaefer, the president of Hirschmann.

Mr. Stream for the defendant then read from Tha are deposition. He refers to the appraisal of an entire plant in 1950 and since then had appraised many more. He also testified that Klein asked for the market value of the plant in-place, intact and ready for operation. He said that the plaintiff was negotiating a contract with the government for the production

8.

of fuses, that is this is what Klein told him and that they wanted to know the value of it as an operating business. I think I have already stated some of the further testimony of Thaler and I shall not repeat.

Thaler said that at a later date Klein asked him what the equipment would be worth at public auction but that on August 12th Klein had asked him for an appraisal of the value of his plant in-place and ready for continued operation and for the value of the plant as an operating business. Klein I believe stated that there was a market value of the plant intact and ready for operation.

In a telephone conversation the following day, according to Thaler, Klein repeated his instructions that Thaler should rely or could rely on the Hirschmann report and that Klein would bring up or bring down the date, Monday night, August 15th and telephone the results of his appraisal on the 15th. And that Klein the following day was called by Thaler and he gave the following totals representing the individual values, \$919,000 representing the in-place value, somewhat more, \$1,056,000.

Now I will give you a summary of Kaefer's testimony which was taken by the defendant and read to you by plaintiff's counsel from the deposition. Kaefer was president of the Hirschmann Corporation. In 1964 he prepared what has been

A-1933
SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

11 .

referred to as the Hirschmann appraisal. He stated that he was not a professional appraiser and that the appraisal of the Micro plant was the first and entire appraisal at the time. He testified in '64 the fortunes of the American Watch Company were ebbing. When questioned as to the values in '66 of items which he had appraised in '64 he stated that there would have been no depreciation as to usefulness but there might have been some depreciation in economic value because of the decline of the watchmaking industry.

Some 75 to 80 percent, however, of the equipment would retain its market value at the same level, in '66 as it was in '64, that is. Nevertheless, that the market value would have been less for the nonwatchmaking machinery.

Now we come to Sinkler. I am sorry to have to bore you with all this. He was formerly the president and chairman of the board of Hamilton Watch Company and had held various positions with this company. Among which was manager of the fuse department and director of research. He testified that he had visited sources through the world who were watchmaking manufacturers. That he represented the watch industry in the United States before the Tariff Commission, sort of a business organization.

He said that the tariffs on the jeweled lever watches between '64 and '66 were \$2.50 for the larger watches and \$3.25

A-1934
SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

--

for the ladies' watches, the smaller ones. The tariffs allowed the United States companies to compete then with the foreign companies. However, not before January, 1967, were the duties actually reduced which had, of course, the opposite effect.

In 1966, according to Sinkler, there were three companies who made jeweled lever watches. There was only one manufacturer of jeweled lever watches and that was Bulova.

He stated that in his opinion no one would have paid premiums in 1966 on watchmaking machinery. On cross examination by defense counsel Sinkler admitted that his prior testimony was correct that he did not know whether in 1966. Time & Micro facility could have been sold intact. He also admitted in his prior testimony to the effect that the sale of the Hamilton Company was negotiated with the government beginning as early as '67.

Defendant called Sidney Kriser. He is president of the defendant, Industrial Plants. He had been associated with Industrial Plants for approximately 40 years and in '66 he was the treasurer and secretary. He testified that in 1966 Jesse Thaler took care of 90 percent of all the appraisals done by defendant and that Thaler had been with the Industrial Plants for at least 35 years. He testified as to a telephone conversation with Klein on August 30, '66, that he told Klein that Mr. Kriser was familiar with Thaler's appraisal and had

received Klein's rough draft of a guarantee proposal in which Klein requested that defendant provide a \$500,000 guarantee to plaintiff as to this buy-back. I won't continue any further about that.

On cross examination Kriser said he had no recollection on the date on which he received Klein's rough draft of a guarantee proposal but that he had received the proposal before he talked to Klein on October 30th. He stated the \$350,000 amount in the buy-back proposal did not represent an appraised value, it was simply the amount of the proposed guarantee.

when questioned as to his prior testimony to the effect that he could not recall certain facts to which he was now testifying he said that he could recall facts today, the date of the testimony. And so you have, as far as I can give it to you, the resume of the testimony. Pleas keep in mind that it is my recollection and that you, members of the jury, must rely on your own. No statement by me is intended to influence your own judgment. If I mention certain things and not mention others you are to draw no significance from that.

As I have previously stated to you at least once and maybe more, you are the sole and the only judges of the credibility of each and every witness as you are of the facts. How do you determine the proof and how do you appraise the

11 .

credibility of witnesses? Well, you have to use your own plain, everyday common sense. You saw the witnesses or heard them. You saw those who appeared personally. You heard those examined by deposition and you could observe from either one the way in which these witnesses answered the questions and gave their testimony. You may ask yourselves how did this witness or that witness impress you. How did this witness appear to be testifying? Was it frankly, candidly, fairly? What degree of credibility which you should give to a witness may be determined by his conduct and manner in testifying and possibly somewhat from his relationship to the interest of the parties to the controversy.

You obviously may take into consideration any interest which any of the witnesses had.

Some of the plaintiff's witnesses are or were officers of the plaintiff and likewise some of the defendant's witnesses were formerly at least connected with the defendant's company and some of them are still today.

I think I mentioned what depositions are so I shall not need to repeat that.

A word about expert testimony. Expert witnesses
give their testimony based upon their own professional experience
and judgement. The weight by way of opinions to be given to
this testimony of experts is governed in the same manner as that

of any other witness. That is by applying your good, ordinary, everyday common sense. You apply the same standards as you would in the case of other witnesses. You must remember, however, with respect to experts that the party offering such testimony must show by a fair preponderance of the credible evidence that these opinions are probably true. You must also remember that the opinion of the expert must be based upon credible, factual evidence in the case. Sometimes the expert is asked in substance to assume certain facts and give his opinion on those facts. If the facts upon which he is asked to render his opinion are not true, obviously it affects the value of the opinion which he gives.

Now you came into this jury I believe on October 14th. All that you know about this case, members of the jury, naturally should have been obtained in this very courtroom in one facet or another. What you know about this case is confined to what you heard from the witness stand or what you observed in the exhibits and from any depositions.

Now when you retire each of you, of course, are entitled to your own opinion. You are expected and required, however, to exchange views with your rellow jurors when you deliberate, and then to discuss and to consider the evidence, to listen to the arguments and reasoning of your fellow jurors, to present your own point of view and then to reach an agreement.

2

1

5 6

7

8

9

10

11 12

13

14

15

16

17

18

19 20

21

22

23

24

25

solely and only on the evidence and without violence to your own opinions, your own judgment. You are not to yield, for example, simply because you are outnumbered. You should vote with the others only if you are convinced on the evidence and the law that it is the correct way to decide this case. On the other hand, you should not hesitate if you are convinced by a fellow juror to change your point of view if it appears to have been erroneous to you.

To return a verdict in this case it must be unanimous. The parties here are entitled to evenhanded justice. They stand equally before you. Sympathy, bias or prejudice of any kind must play no part in your determination of this case. Your duty is to try the issues fairly and impartially. I have prepared a special verdict here which must be answered by you in all of the questions pursuant to my instructions which I have given you this afternoon and upon the basis of the facts as you find them to be. This must be by a unanimous vote.

I also tell you this: if you believe that is reasonably necessary you may ask the Court to read or have the reporter read any particular portion of any of the testimony by any witness. Please endeavor to state the area in which you are interested. You will also receive when you retire to deliberate all of the exhibits and a list of each exhibit,

11 .

•

know.

the plaintiff's exhibits and the defendant's exhibits.

After you have rendered your verdict you are not

required to speak to anyone or answer any questions about what went on here or what you did in the course of your deliberations. In fact I advise you not to do so, not to listen to any such questions. However, Mr. Foreman, in connection with your deliberations I must advise you not to report at any time in any of your written questions which you submit or which you may submit to the Court any relation, any statement about how you stand or anything of that sort. Please do not get in to that.

If you want testimony, please let the foreman sign a note addressed to the Court. You have the exhibits so you don't have to ask for any of them. These exhibits are all available to you and the statements, the list of exhibits enables you to find probably whatever you may wish to more part cularly examine.

Are there any exceptions, Mr. Brill?

MR. BRILL: If your Honor please, I do have one or two matters to take up outside the presence of the jury.

THE COURT: I will take it up. I just wanted to

Please remain in the box for the present and you will be in charge of a deputy marshal. The Court will retire and

A-1941

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

jq/lf

negligence as a breach of contract I believe your Honor charged that a willful or negligent failure to perform the contract, as I have down, a willful or negligence failure might be a negligent contract. I ask that your Honor charge that negligence does breach the contract.

THE COURT: Not in every instance.

MR. BRILL: I believe your Honor charged that if the jury firds that plaintiff asked for a fair market value appraisal and defendant's supplied only a fair market value appraisal that that could not be used or relied upon in connection with a forced liquidation value appraisal and I except to that charge, your Honor.

THE COURT: I think that is absolutely right. Anything else?

MR. BRILL: One further exception, your Honor, I believe. With respect to the charge on damages again that no adequate explanation was offered to the jury as to what sums may or may not be considered in computation of damages.

THE COURT: I have done so.

MR. STREAM: I have one technical exception as to the Court's charge which directed the jury to limit its consideration of mitigated damages to \$20,000.

THE COURT: I have noted it and I believe that is in accord with my rulings.

MR. STREAM: Your Honor charged the jury that the statements subsequent to the agreement as to the appraisal are not determinative of the terms of the appraisal and f except unless this Court were to charge that the jury may consider those subsequent statements and the exchange of correspondence as some evidence --

THE COURT: Insofar as they bear on the original conversations?

MR. STREAM: As some evidence of the intention of the parties.

THE COURT: All right.

MR. STREAM: Apart from that I have no exceptions.

THE COURT: What about the statement which Mr. Brill made with regard to the negligence? Should I alter that?

MR. STREAM: I don't see why the charge wasn't complately proper and I don't think this Court should in directing a verdict could do anything but suggest that those circumstances might constitute a breach of contract. I don't think this court could properly charge that anything in fact did constitute a breach of contract. I would ask the Court to adhere to its charge and to refuse the modifications suggested.

THE COURT: All right. There is one thing I will agree to do.

A-1943

g

22 23

MR. BRILL: May I reply?

THE COURT: No, one shot is enough. I shall charge something about the statements made.

(In open court - jury present)

THE COURT: Ladies and gentlemen of the jury, after conferring with counsel I want to modify one statement which I made and I shall let this supercede any other statement which I made about it. You may consider statements or correspondence by the parties made after the date of August 12, 1966, the time of the original contractual arrangements, if it sheds light upon what the intentions of the parties were at that time in making the contract. I think that conforms to what you requested.

MR. STREAM: Thank you very much, your Honor.

THE COURT: That is all. Now you may retire. We will give you the special verdict,

One of these should be given to each of the six who will first deliberate, only the six obviously are to go out.

You may hand one to all present jurors. Also hand out the list of exhibits to each person. I think only the six will require those, Mr. Clerk.

The first question, members of the jury, is the basic one and that it was the contract so and so. If it was other-wise, then it wasn't as indicated. If your answer is yes, you

11 -

--

go on to 2. If it is no, you stop. Second relates to whether or not the plaintiff has proved by a fair preponderance of the credible evidence that the defendant breached the contract. If yes, you proceed. If not, you stop.

Damages is part 2. Has the plaintiff proved by a fair preponderance of the credible evidence that it relied upon the defendant's appraisal when it agreed to guarantee a bank loan made to Time & Micro and that any loss was suffered by plaintiff by reason of this agreement to guarantee the bank loan and that was a natural and probable consequence of the breach of contract as stated in question 1 and 2. If your answer is yes, proceed to question 4. If your answer to 3 is no, proceed to question 5, I believe it is.

Question 4, what is the amount to which plaintiff is entitled for damages. That you will fill out in connection with 5, what is the amount by which said damages -- that is after deciding the amounts, and the claim, of course, is the basic amount of the payment made by the plaintiff to the bank, and that is \$161,000. Then you must consider whether or not, 5, the amount to which the damages are to be reduced by reason of recovery received by plaintiff from the government. This is the mitigation, and this I direct not to exceed \$20,000. Obviously B then is the difference between the amount in 4 after the deduction of the possible \$20,000.

11 .

If there are any questions at any time, Mr. Foreman, which the jurors have, put them 'n writing and sign the note and give it to the deputy.

MR. STREAM: I think your Honor will want to tell the jury that the fact that there is a part 2 section called "Damages" carries no implication.

THE COURT: That is right. I said in my charge that the fact that I discussed damages does not in any way indicate whether or not you should grant damages, neither does the fact that there is a part 2 entitled 'Damages' do anything of that sort.

That is all, ladies and gentlemen. Now you may retire.

First will the two alternates go and get any wraps or other things which you have in the jury room and come out and sit in the back of the courtroom for the time being.

Mr. Foreman, this copy is the one which will be signed. The copies given to the other five members of this deliberating jury do not have the blanks. Each one signs, however, in the appropriate spot on the third sheet of the original which you have, Mr. Foreman. If there are any questions send a note in.

You may retire.

I might as well say this: I am going to excuse you around 15, 20 minutes from now and you will be asked to return

tomorrow under appropriate instructions which I shall give you at the time when you are dismissed for the day. You may retire now.

(At 4:32 the jury commenced their deliberations.)

(At 4:50 the jury returned to the courtroom.)

THE COURT: Members of the jury, as I indicated before, I am going to send you home so that you won't have to run around in this area this evening, among other things, and with these instructions: you will pass along all the papers to the foreman and the foreman will turn them into an envelope, place them in an envelope supplied by the Clerk and you will seal the envelope and initial it with the date, please, on the back of it. My instructions to each of you are basically the same as originally in this lawsuit. Please do not discuss this case with anyone else. Do not discuss it with one another. Do not call anybody, anyoreof your fellow jurors and talk to them about the case, for instance, and then come back tomorrow morning at which time the foreman will get the envelope and you will commence the deliberations only when all six of you are here.

The six jurors may go and I will instruct the alternates that are patiently awaiting in the rear.

(Jury left the courtroom)

THE COURT: To the two alternates, I assume you have

A-1947

1 jq/lf

3 4 5

)

)

)

11 -

your wraps and bags and so forth. Ordinarily, ladies, even if one of the present deliberating six -- you have listened to this case and you will have no responsibility for it. I cannot substitute one of you even if one of the six maybe by tomorrow noon has some little trouble or illness. It will simply be unfortunate for this trial. I assume, gentlemen, there is no reason why I should keep these alternates coming back tomorrow. Is there any disagreement with that?

MR. STREAM: I don't mind holding them and if there is a sickness I will consent to substitute one of the alternates.

THE COURT: You might come back tomorrow, please. Thank you very much.

Jq/lf 1 1019 AJAX HARDWARE MFRG. CORP. 3 vs. 69 Civ. 1900 INDUSTRIAL PLANTS CORP. 5 October 23, 1975 10:00 a.m. 6 7 (At 10:07 a.m., the jury resumed their deliberations.) 8 (In open court - jury not present) 9 THE COURT: Can we have Klein's testimony and the 10 parts of Thaler's deposition that were read. 11 I am going to ask them to go back and see if they 12 can limit it, gentlemen. 13 MR. STREAM: I agree, your Honor. 14 THE COURT: It will take more than three or four 15 hours to do that. 16 MR. STREAM: More than that, your Honor, Klein 17 testified for two days and Thaler one day. 18 (At 11:40 a.m., the jury returned to the courtroom.) 19 THE COURT: Mr. Foreman and members of the jury, 20 I have your note which, as I understand it, and it's difficult 21 to read it, is as follows: "Can we have Klein's testimony 22 and the parts of Thaler's deposition that were read." I 23 want to remind you that I said that you might ask for testi-24 mony if you reasonably believed that it is necessary. That is 25 the first qualification and necessity. Secondly, I believe I

A-1949

SOUTHERN DISTRICT COURT REPORTERS. U.S. COURTHOUSE

1 jq/lf asked you to indicate the area about which you inquire. I am told by the reporter that, as you probably know, Klein was 3 in court here testify'ng for at least two days and it's going to take hours to read that. As far as the deposition is con-5 6 cerned it's 250 pages and I don't know how long that will take. 7 But that will take at least an hour and that is an underestimate. 8 I am going to ask you to pback and see if you can 9 reduce the area to which or about which you are concerned and 10 I have just been told by the clerk that he has given a fountain 11 pen to the deputy out there and I must say, Mr. Foreman, that 12 I can hardly read these faint pencil markings on this rote. 13 Will you please either use a pen or else get a sharpened pencil 14 from one of the members of the jury. 15 You are excused now. 16 Inform the deputy when you are ready and with a 17 new note designating if possible the area you want. 18 (At 11:45 the jury resumed their deliberations.) 19 THE COURT: It is stipulated by and between the 20 attorneys in this case for the plaintiff and for the defendant 21 that this jury may render a verdict of any five jurors in this

1020

0

MR. PRILL: Yes, your Honor.

MR. STREAM: Agreed to.

22

23

24

25

agreed to, sir?

case with the same force and effect as if by six. Is that

10

11 -

12

13

14

15

16

17

18

19

20

21

22

23

(At 12:10 p.m., the jury returned to the courtroom.)

THE COURT: I want to give certain information,

Mr. Foreman, and jurors, at this time. The attorneys in this

case have agreed and stipulated that this jury may render a

verdict by any five of the jurors now on this case. Therefore,

as soon as you have five who agree and who sign the special

verdict you may notify the deputy marshal and then I will
take it up with you. This, however, does not preclude your

areas of reading of testimony. So be it, now you may retire.

asking any questions or asking for any reasonably defined

(At 12:11 the jury resumed their deliberations.)

(At 12:25 p.m. a note was received from the jury.)

THE COURT: We have a verdict, call the jurors in.

(At 12:26 p.m. the jury returned to the courtroom.)

(Roll call at this point)

THE CLERK: Mr. Foreman, have the jurors agreed upon a verdict?

THE FOREMAN: Yes, your Honor, we have.

THE CLERK: How do you find to question number 1?

THE FOREMAN: We find question number 1 no.

THE COURT: Very well. That is all that is necessary.

Will you give that in to the clerk. I want to examine this.

I find that the answer to number 1 is in the no section. I find that the special verdict is signed by number

24 25

5

6

7

9

10

11 -

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1, number 2, number 3, number 5 and number 6.

(Each juror, upon being asked by the Clerk, "Is that your verdict?", answered in the affirmative.)

THE COURT: Very well. I wish to thank the jury not for the verdict which was made but for returning a verdict. I believe you are through. Are they through with your term now?

THE CLERK: They must return to the central jury room at which time they most likely will be discharged.

THE COURT: One of the jurors please wait to take the cards.

You have the exhibits and I don't need that; you have to take any other papers of the jurors. You may return any other papers which they have worked on to the jury.

Distribute them to whichever juror may have had it.

All exhibits have been based on the table here.

MR. STREAM: May I have a word on the record. I am going to make it short.

Ladies and gentlemen of the jury, thank you very much.

THE COURT: You may go and return to 109. The alternates are also dismissed at this time. Thank you for your services. You are dismissed and you are to return downstairs, too.

A-1952

0

Э

•

)

7

(

Э